

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

- - - - -x

In the Matter of:

DPH HOLDINGS CORP., ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

300 Quarropas Street

White Plains, New York

March 18, 2010

10:12 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Status Conference on Various Adversary Proceedings.

Final Fee Applications of Professionals for the Period from
October 8th, 2005 through January 25, 2008.

Notice of Hearing on Forty-Fourth Omnibus Objection.

Notice of Hearing on Forty-Fifth Omnibus Objection related to
Administrative Claims.

Notice of Hearing Proposed Thirty-First Claims Hearing Agenda
filed by John William Butler, Jr. on behalf of DPH Holdings
Corp., et al.

Notice of Hearing Proposed Fifty-Third Omnibus Hearing Agenda
filed by John William Butler, Jr. on behalf of DPH Holdings
Corp., et al.

Transcribed by: Dena Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Attorneys for Reorganized Debtors

155 North Wacker Drive

Chicago, IL 60606

BY: JOHN WM. BUTLER, JR., ESQ.

JOHN K. LYONS, ESQ.

JOSEPH N. WHARTON, ESQ. (TELEPHONICALLY)

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Attorneys for Reorganized Debtors

Four Times Square

New York, NY 10036

BY: KAYALYN A. MARAFIOTI, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BUTZEL LONG, P.C.

Attorneys for Preference Actions

380 Madison Avenue

22nd Floor

New York, NY 10017

BY: ERIC B. FISHER, ESQ.

BUTZEL LONG, P.C.

Attorneys for Preference Actions

150 West Jefferson

Suite 100

Detroit, MI 48226

BY: CYNTHIA J. HAFHEY, ESQ.

BUTZEL LONG, P.C.

Attorneys for Preference Actions

41000 Woodward Avenue

Bloomfield Hills, MI 48304

BY: THOMAS B. RADOM, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CADWALADER, WICKERSHAM & TAFT, LLP
One World Financial Center
New York, NY 10281

BY: SAMUEL S. CAVIOR, ESQ.

COVINGTON & BURLING LLP
Attorneys for Covington & Burling
620 Eighth Avenue
New York, NY 10018

BY: SUSAN POWER JOHNSTON

FOLEY & LARDNER LLP
Attorneys for Ernst & Young
321 North Clark Street
Suite 2800
Chicago, IL 60610

BY: MARK L. PRAGER, ESQ.

1 FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

2 Attorneys for Equity Committee

3 One New York Plaza

4 New York, NY 10004

5
6 BY: BONNIE STEINGART, ESQ.

7
8
9 LATHAM & WATKINS LLP

10 Attorneys for Unsecured Creditors' Committee

11 53rd at Third

12 885 Third Avenue

13 New York, NY 10022

14
15 BY: MARK A. BROUDE, ESQ.

16
17
18 LOEB & LOEB LLP

19 Attorneys for Deloitte & Touche, LLP

20 345 Park Avenue

21 New York, NY 10154

22
23 BY: DANIEL B. BESIKOF, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REICH REICH & REICH, P.C.

Attorneys for Critech Research, Inc.

235 Main Street, Suite 450

White Plains, NY 10601

BY: LAWRENCE R. REICH, ESQ.

SHEARMAN & STERLING LLP

599 Lexington Avenue

New York, NY 10022

BY: DOUGLAS P. BARTNER, ESQ.

THOMPSON HINE LLP

Attorneys for Rieck Group

35 Madison Avenue

12th Floor

New York, NY 10017

BY: BARRY M. KAZAN, ESQ.

1
2 THOMPSON HINE LLP

3 Attorneys for Rieck Group

4 2000 Courthouse Plaza, N.E.

5 10 W. Second Street

6 Dayton, OH 45402

7
8 BY: LAWRENCE T. BURICK (TELEPHONICALLY)

9
10
11 TOGUT, SEGAL & SEGAL LLP

12 Conflict Counsel for Reorganized Debtors

13 One Penn Plaza

14 New York, NY 10010

15
16 BY: NEIL BERGER, ESQ.

17
18
19 UNITED STATES DEPARTMENT OF JUSTICE

20 Office of the United States Trustee

21 271 Cadman Plaza East

22 Suite 4529

23 Brooklyn, NY 11201

24
25 BY: ALICIA M. LEONHARD, AUST

1 BAKER & MCKENZIE, LLP
2 Attorneys for Donobat Machine Tool Co., Inc.
3 130 East Randolph Drive
4 Suite 3900
5 Chicago, IL 60601

6
7 BY: LAWRENCE T. VONCKX, ESQ. (TELEPHONICALLY)
8
9

10 BANNER & WITCOFF, LTD.
11 Attorneys for DPH Holdings Corp.
12 Ten South Wacker Drive
13 Suite 3000
14 Chicago, IL 60606
15

16 BY: CHARLES W. SHIFLEY, ESQ. (TELEPHONICALLY)
17
18

19 CALFEE, HALTER & GRISWOLD, LLP
20 Attorneys for Williams Advanced Materials
21 1400 KeyBank Center
22 800 Superior Avenue
23 Cleveland, Ohio 44114
24

25 BY: NATHAN A. WHEATLEY, ESQ. (TELEPHONICALLY)

DICKINSON WRIGHT, PLLC

Attorneys for Dickinson Wright

500 Woodward Avenue

Suite 4000

Detroit, MI 48226

BY: KRISTI A. KATSMA, ESQ. (TELEPHONICALLY)

DLA PIPER, LLP (U.S.)

Attorneys for Mobile Area, Inc., et al.

550 South Hope Street

Suite 2300

Los Angeles, CA 90071

BY: BRENDAN P. COLLINS, ESQ. (TELEPHONICALLY)

NATASHA L. JOHNSON, ESQ. (TELEPHONICALLY)

1
2 DYKEMA GOSSETT PLLC

3 Special Counsel for DPH Holdings, Corp.

4 39577 Woodward Avenue

5 Suite 300

6 Bloomfield Hills, MI 48304

7
8 BY: RONALD L. ROSE, ESQ. (TELEPHONICALLY)

9
10
11 FOLEY & LARDNER, LLP

12 Attorneys for Ernst & Young

13 321 North Clark Street

14 Suite 2800

15 Chicago, IL 60654

16
17 BY: JOANNE LEE, ESQ. (TELEPHONICALLY)

1
2 GORLICK, KRAVITZ & LISTHAUS, P.C.

3 Attorneys for International Union of Operating

4 Engineers Locals

5 17 State Street

6 4th Floor

7 New York, NY 10004

8
9 BY: BARBARA S. MEHLSACK, ESQ. (TELEPHONICALLY)

10
11
12 GREGORY P. JOSEPH LAW OFFICES LLC

13 Attorneys for Official Committee of Equity Security

14 Holders of Delphi Corporation

15 485 Lexington Avenue

16 30th Floor

17 New York, NY 10017

18
19 BY: MICHAEL B. SLOAN, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

GROOM LAW GROUP

Groom Law Group

1701 Pennsylvania Avenue, N.W.

Washington, DC 20006

BY: JASON H. LEE, ESQ. (TELEPHONICALLY)

HASKELL SLAUGHTER YOUNG & REDIKER, LLC

Attorneys for Simco Construction, Inc.

1400 Park Place Tower

2001 Park Place North

Birmingham, AL 35203

BY: ROBERT ADAMS, ESQ. (TELEPHONICALLY)

HOWARD & HOWARD

Attorneys for Howard & Howard

450 West Fourth Street

Royal Oak, MI 48067

BY: LISA S. GRETCHKO, ESQ. (TELEPHONICALLY)

1
2 IVINS PHILLIPS & BARKER, CHARTERED

3 1700 Pennsylvania Avenue, N.W.

4 Suite 600

5 Washington, DC 20006

6
7 BY: WILLIAM L. SOLLEE, JR., ESQ. (TELEPHONICALLY)

8
9
10 JAECKLE FLEISCHMANN & MUGEL, LLP

11 Attorneys for Jaeckle Fleischmann & Mugel

12 12 Fountain Plaza

13 Buffalo, NY 14202

14
15 BY: MARJORIE BIALY, ESQ. (TELEPHONICALLY)

16
17
18 KING & SPALDING LLP

19 Attorney for KPMG

20 1185 Avenue of the Americas

21 New York, NY 10036

22
23 BY: DANIEL G. EGAN, ESQ. (TELEPHONICALLY)

1
2 LAMBERT, LESER, ISACKSON, COOK & GIUNTA, P.C.

3 Attorneys for ProTech Machine

4 309 Davidson Building

5 916 Washington Avenue

6 Bay City, MI 48708

7
8 BY: SUSAN M. COOK, ESQ. (TELEPHONICALLY)

9
10
11 LAW OFFICE OF JOHN MARQUESS

12 Attorney for Legal Cost Control, Inc.

13 255 Kings Hwy E #A3,

14 Haddonfield, NJ 08033

15
16 BY: JOHN MARQUESS, ESQ. (TELEPHONICALLY)

17
18
19 MACDONALD ILLIG JONES & BRITTON LLP

20 Attorneys for Blair Strip Steel

21 100 State Street

22 Suite 700

23 Erie, PA 16507

24
25 BY: SUSAN FUHRER REITER, ESQ. (TELEPHONICALLY)

1
2 MAYER BROWN, LLP

3 Attorneys for Delphi Corporation

4 71 South Wacker Drive

5 Chicago, IL 60606

6 BY: CRAIG E. REIMER, ESQ. (TELEPHONICALLY)

7
8
9 O'MELVENY & MYERS LLP

10 Attorneys for Delphi Corp.

11 1625 Eye Street, NW

12 Washington, DC 20006

13
14 BY: TOM JERMAN, ESQ. (TELEPHONICALLY)

15
16
17 PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER, & BRUEGGEMAN, S.C.

18 Attorneys for IBEW & IAM

19 1555 N. RiverCenter Drive

20 Suite 202

21 Milwaukee, WI 53212

22
23 BY: MARIANNE GOLDSTEIN ROBBINS, ESQ. (TELEPHONICALLY)

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

2 Attorneys for Quinn Emanuel Urquhart & Sullivan, LLP

3 865 S. Figueroa Street

4 10th Floor

5 Los Angeles, CA 90017

6

7 BY: TIGRAN GULEDJIAN, ESQ. (TELEPHONICALLY)

8

9

10 QUINN EMANUEL URQUHART & SULLIVAN, LLP

11 Attorneys for Quinn Emanuel Urquhart & Sullivan, LLP

12 51 Madison Avenue

13 22nd Floor

14 New York, NY 10010

15

16 BY: JOSEPH G. MINIAS, ESQ. (TELEPHONICALLY)

17

18

19 WILMER CUTLER PICKERING HALE AND DORR, LLP

20 Attorneys for DPH Holdings Corp., et al.

21 399 Park Avenue

22 New York, NY 10022

23

24 BY: PHILIP D. ANKER, ESQ. (TELEPHONICALLY)

25 MICHELLE A. GOLDIS, ESQ. (TELEPHONICALLY)

1
2 ALSO PRESENT (TELEPHONICALLY):

3 JOHN BROOKS, DPH Holdings

4 STEVE CARLIN, KPMG

5 SEAN CORCORAN, ESQ., DPH Holdings

6 DANIEL CROWLEY, Houlihan Lokey

7 BRIAN D. DECKER, PricewaterhouseCoopers

8 ROBERT E. DETTINGER, In Propria Persona

9 PETER MCCORMICK, Buck Consultants

10 PATRICK MORROW, Jefferies & Co., Inc.

11 BROCK PLUMB, Deloitte & Touche, LLP

12 JOHN SHEEHAN, Delphi Fee Committee

13 GARY SILBERG, In Propria Persona
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Okay, good morning.

4 This is In re: DPH Holdings Corp, et al.

5 MR. LYONS: Good morning, Your Honor. John Lyons on
6 behalf of the reorganized debtors. This is the fifty-third
7 omnibus hearing, Your Honor, and with me in court, I have my
8 partner, Jack Butler and Kayalyn Marafioti, who you're well-
9 familiar with. Also, Your Honor, we have in court John Brooks,
10 who is the president of DPH Holdings who has not yet been
11 introduced to Your Honor. Mr. Brooks is in charge of the wind-
12 down. And then we also have Dean Unrue who is the claims
13 administrator, who's here, among others here in court, as well.

14 THE COURT: Okay.

15 MR. LYONS: Your Honor, with your permission, we would
16 like to proceed through the omnibus agenda. There are three
17 groups of matters. First, there is a status conference on
18 various adversary proceedings. And then we also have the
19 forty-fourth and forty-fifth omnibus claims objection, and then
20 finally, the fee app matters which will probably cover the bulk
21 of the omnibus hearing.

22 THE COURT: Okay, my thought was maybe it would make
23 sense to flip the last two matters and do the fee applications
24 since I think we have a lot of people here on those matters
25 and --

1 MR. LYONS: Okay, so should we proceed first --

2 THE COURT: -- and as I understand from communications
3 with chambers, most of those matters, if not all of them ,have
4 now been resolved, as far as the U.S. trustee's objections. So
5 let's do it in that order, instead.

6 MR. LYONS: Okay, very good, Your Honor. I'll turn
7 the podium over to --

8 THE COURT: Well, I'd like the report first, though,
9 in dealing with the adversary proceedings, and then we'll deal
10 with the fees.

11 MR. LYONS: Very good.

12 THE COURT: Just the claim objections will be last.

13 MR. LYONS: Very good. I'd like to introduce, then,
14 Eric Fisher, counsel for DPH Holdings, with respect to the
15 adversary complaints.

16 THE COURT: Okay.

17 MR. FISHER: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. FISHER: Eric Fisher with Butzel Long. I'm here
20 today with my partner, Cynthia Haffey. As Your Honor is aware,
21 there are 177 adversary proceedings that were retained pursuant
22 to a preservation order entered by the Court. For today,
23 thirty-seven of those retained actions were originally
24 scheduled for an initial status conference, and thirty of those
25 thirty-seven adjournments were granted, mostly due to ongoing

1 settlement discussions in those actions. We believe, Your
2 Honor, that it makes sense to address the procedural and
3 scheduling issues concerning those actions that were scheduled
4 for a status conference today in the broader context of all of
5 the retained adversary proceedings, and to that end, yesterday,
6 Your Honor, we filed a motion for a case management order that
7 would govern all of the preference actions that are now in the
8 process of being unsealed and served. That motion is set for
9 hearing on April 22nd. If Your Honor wishes for me to address
10 some of the elements of the case management order, I'm happy
11 to, although I believe that it's not necessary at this moment.

12 THE COURT: No, I don't think you should do that. Did
13 you serve the parties to the preference actions?

14 MR. FISHER: Yes, we've served the motions --

15 THE COURT: I'm sorry, someone who's sort of Darth
16 Vader breathing on the phone should put their phone on mute.

17 Okay, sorry, you can go ahead.

18 MR. FISHER: I also wanted to clarify, Your Honor,
19 that our firm, Butzel Long, will be representing DPH Holdings
20 with regard to 165 of the preference actions. Eleven of them,
21 DPH Holdings will be represented by the firm of Togut, Segal.
22 But again, in an effort to ensure that common procedures apply
23 to all of these actions, Togut, Segal joins in the case
24 management order on behalf of DPH Holdings.

25 THE COURT: Okay.

1 MR. FISHER: So we're talking about procedures that
2 would be common to all of the actions.

3 THE COURT: All right. Unless there's something I
4 really need to focus on before the April hearing, then, I'll
5 just -- I'll just deal with it then.

6 MR. FISHER: Okay, Your Honor, there's only, then, one
7 issue as to which I would respectfully request the Court's
8 guidance. And that is, there are a number of defendants who
9 are foreign defendants who do not have a location for service
10 in the United States. Our current deadline for service under
11 the last extension order that Your Honor entered provides for
12 service by April 5 of this year. Before that date, we expect
13 to have all of the summonses and complaints issued, translated,
14 and transmitted to the foreign serving authorities with regard
15 to those defendants, but as I'm sure Your Honor's aware, under
16 the Hague Convention, it can take quite a number of months to
17 complete service. And my question, Your Honor, is simply
18 whether we ought to move for a further extension as to those
19 foreign defendants before April 5th or whether the Court will
20 entertain those motions after that date?

21 THE COURT: I think to be safe, you should move before
22 April 5th.

23 MR. FISHER: Will do, Your Honor.

24 THE COURT: The ultimate resolution, if you didn't,
25 may depend on the individual countries where service is made,

1 and it's probably safer to do it beforehand.

2 MR. FISHER: Understood.

3 THE COURT: Okay. Okay.

4 MR. FISHER: Thank you, Your Honor.

5 MR. BUTLER: Your Honor, good morning. Jack Butler,
6 counsel for DPH Holdings here in connection with the final fee
7 applications of professionals for the period from October 8th,
8 2005 through January 25, 2008. These are matters 4 through 44
9 on the omnibus agenda. Present in the courtroom, Your Honor,
10 in addition to Mr. Brooks, who was introduced to you as
11 president of DPH Holdings, is Sean Corcoran, counsel to DPH
12 Holdings, who has been assisting in the fee review process, and
13 John Sheehan, who is the representative of the Delphi fee
14 committee, who's also present in the courtroom, if the Court
15 has any questions. And as the Court's aware, Alicia Leonhard,
16 from the Office of the United States Trustee who's also a
17 member of the fee committee and who also had independently
18 reviewed this as is the responsibility of the U.S. trustee and
19 filed a separate objection which has been resolved -- and I'll
20 report on that in a few minutes -- Ms. Leonard is also here and
21 will address the Court at the appropriate time. So those are
22 the -- in addition, there are representatives of most of the
23 applicants and applicants who had principal roles in the case,
24 most of them are present in court today, individually, in case
25 Your Honor has any questions, and many of the others are

1 represented, as chambers permitted, on the telephone --
2 telephonically.

3 THE COURT: Okay.

4 MR. BUTLER: Your Honor, in accordance with Article
5 10.3, the modified plan, the deadline to file final fee
6 applications was December 31st, 2009. On January 26th, 2010,
7 Your Honor, entered an order at docket number 19370 that
8 enlarged the time for professionals to file applications until
9 February 1, 2010. In connection with that order, Your Honor
10 included a paragraph 4 of that January 26 order that indicated
11 that any professional who used the enlargement period would be
12 limited in respect to their fees and expenses for the seventh
13 interim fee period to no more than the lesser of what Your
14 Honor awarded, ultimately, but not more than the amount the
15 fees and expenses estimated and reported to the debtors in
16 advance of the October 6th consummation of the plan. There
17 were, Your Honor, ten professionals who filed after December
18 31st. I simply wanted the record to indicate that none of them
19 have sought amounts that have exceeded the amounts that were
20 estimated prior to the modified plan, so subject to Your
21 Honor's determining what the Court will reward, all of them are
22 in compliance with Your Honor's January 26th order.

23 THE COURT: Okay.

24 MR. BUTLER: Your Honor, there are forty-one
25 professionals that have final fee applications pending before

1 the Court. In the aggregate, it's approximately 374 million
2 dollars in professional fees and approximately 24.9 million
3 dollars in charges and disbursements for the period involved.
4 There were, Your Honor, five professionals among the forty-one
5 applicants that sought approval of fees after January 25th,
6 2008. Those are not part of the final fee application process,
7 pursuant to Article 10.3 of the modified plan and paragraph 33
8 of the confirmation order. And those amounts have been
9 excluded from the proposed order that's been presented to Your
10 Honor, and those applicants have been advised of that. And
11 those are being dealt with in the ordinary course by DPH
12 Holdings.

13 Your Honor, on January 28th of this year, Your Honor
14 entered an order at docket number 19383 that scheduled the
15 hearing on the final fee applications for March 18th, 2010. On
16 February 3rd, 2010, a notice of hearing on the final fee
17 applications filed at docket number 19394 was filed listing the
18 retained professionals and the amounts for which they sought
19 approval. There were two professionals, Pagemill Partners, LLC
20 and Crowell & Moring LLP, that had been retained earlier in
21 these cases. They never filed either interim or final fee
22 applications, and there's no provision for them receiving any
23 kind of final approval today. I think my understanding, Your
24 Honor, is that they never incurred fees that would be subject
25 to review of the Court. One had a contingent arrangement that

1 was never consummated; the other one had no fees that were
2 subject to the Court's review.

3 THE COURT: Okay.

4 MR. BUTLER: But in any event, if they are, they're at
5 their risk, not the estate's as part of the reorganized
6 companies.

7 In addition, Your Honor, there were two professionals,
8 Buck Consultants, LLC, and Dickinson Wright, PLLC that were
9 incorrectly listed in the final fee application notice. With
10 respect to Buck Consultants, the final fee application notice
11 listed final approval of 248,074 dollars in fees and no charges
12 in disbursements. After review, the fee review committee
13 determined that that amount actually included approximately
14 95,000 dollars of fees that was incurred after January 25th,
15 2008 and in connection with the fee committee's review, the
16 amounts before the Court were reduced to 153,506 in fees and no
17 charges in disbursements.

18 Similarly, with respect to the Dickinson Wright law
19 firm, the final fee application notice should have listed
20 455,642.49 for fees and 21,976.71 for charges and
21 disbursements. In addition, there was some issues with respect
22 to the Dickinson Wright application in that they withdrew their
23 final fee application. They converted to an ordinary course
24 professional at some point and filed the final fee application
25 well in advance of any of the other firms, and had been advised

1 that that wasn't going to be considered at that time. They
2 withdrew it. There was -- the fee committee consulted with
3 them, reviewed the amounts of their fees, and determined that
4 the application they did file in their prior interim
5 applications should be deemed their final application. I think
6 Ms. Leonhard, on behalf of the U.S. trustee, similarly
7 concurred.

8 THE COURT: And it was still noticed?

9 MR. BUTLER: It was still noticed, yes, Your Honor.

10 THE COURT: Okay.

11 MR. BUTLER: But it was --

12 THE COURT: As far as the public -- the creditor body
13 thought, it was subject to review?

14 MR. BUTLER: I think that's correct, Your Honor.

15 THE COURT: Okay.

16 MR. BUTLER: Your Honor, there was a reconciliation
17 process that went on in these cases which I want to report on
18 briefly, and that has to do with Articles 10.3(b) and 10.3(c)
19 of the modified plan. And in connection with the debtors'
20 emergence from Chapter 11, professionals were required to
21 submit estimates for unbilled amounts and statements for unpaid
22 amounts, including outstanding holdback amounts. And that led
23 DPH Holdings, prior to emergence, to conduct a thorough review
24 of all the professional fees in the case, in addition to what
25 had been done with the fee review committee over the first six

1 interim periods. And those amounts were all reconciled at that
2 time when the professional fee escrows were set up in
3 connection with emergence from Chapter 11. Although those
4 professional fees were reviewed and reconciled by the debtors
5 in advance of the effective date, the fee review committee,
6 acting through the debtors' representatives on the fee review
7 committee, also undertook a review of the final fee
8 applications. And during this review, which was a second
9 review, if you will, the fee review committee identified
10 discrepancies in six of the professionals' fee applications,
11 and determined that the amounts of those fees and expenses
12 exceeded, on an aggregate basis, the amount anticipated by the
13 committee based on the court awards for the six interim periods
14 and the monthly invoices that had previously been reviewed and
15 reconciled by the debtors. And in each of those cases, the fee
16 review committee contacted those professionals to reconcile the
17 discrepancies. The reconciliation resulted in the six
18 professionals agreeing to reduce the fees or charges in an
19 aggregate amount of approximately 215,000 dollars.

20 THE COURT: And they're all within the estimate?

21 MR. BUTLER: Yes. They are, now. They're all within
22 the estimate, now, and they're all within the expectations of
23 DPH Holdings and the fee committee based on the work that had
24 been previously done.

25 THE COURT: Okay.

1 MR. BUTLER: Additionally, Your Honor, as Ms. Leonhard
2 had and the U.S. trustee had always indicated when they
3 participated in the fee review committee, the U.S. trustee
4 retained their individual prerogative and authority to review
5 final fee applications and make their own determinations as to
6 their positions on those applications. That resulted in a
7 filing of an objection as to certain amounts involving certain
8 firms, all of which have now been resolved. And I'll report on
9 those briefly.

10 Ms. Leonhard, unless you'd like to. Do you want me to
11 report? Let me just stop right now and ask Ms. Leonhard --

12 THE COURT: Okay, all right.

13 MS. LEONHARD: Thank you. Good morning, Your Honor.
14 Alicia Leonhard for the U.S. trustee. Your Honor, the U.S.
15 trustee reviewed the fees for the entire case, as is our
16 statutory duty. However, all but one objection involved the
17 fees requested for the seventh interim fee period. The U.S.
18 trustee participated in the fee committee for the first through
19 sixth interim fee periods, and as a result -- and concurred in
20 the resolutions on those applications, so therefore, the U.S.
21 trustee did not second-guess any resolutions with respect to
22 those fees for those periods, except the one issue with respect
23 to WilmerHale and Pricewaterhouse. The U.S. trustee had no
24 involvement in the fee committee after confirmation of the plan
25 and was not involved in the review of the seventh interim fee

1 applications with the fee committee.

2 I'm very happy to report that the U.S. trustee's
3 resolved all of the issues. As Mr. Butler reported, Dickinson
4 Wright -- we agreed with Dickinson Wright that their sixth
5 interim fee application would be deemed the final application,
6 and the U.S. trustee reviewed it and has no objections to the
7 award of final fees or to the payment of the holdback.

8 With respect to Rothschild, the issue was whether
9 Rothschild had met its burden of proof that it was entitled to
10 the completion fee and an M&A fee and -- M&A fees, I should
11 say -- and whether they had properly credited the M&A fee
12 against the completion fee. After discussions with Rothschild,
13 they filed a response to the U.S. trustee's objection, and as
14 it turned out, the transactions that triggered the entitlement
15 to those fees took place after confirmation of the first plan,
16 and technically, aren't within the purview of Section 330. And
17 in their response, Rothschild met their burden of proof. And
18 to the extent that those fees are reviewable under 330, the
19 U.S. trustee has no objection.

20 WarnerStevens requested future fees, but the debtors
21 and the U.S. trustee agreed that the debtor could pay them in
22 the ordinary course of business because they were incurred
23 postconfirmation of the original plan.

24 Fried Frank has agreed to a reduction of 26,500 --
25 excuse me, 30,000 dollars to resolve the U.S. trustee's

1 objection. Skadden has agreed to a reduction of 100,000
2 dollars to resolve the U.S. trustee's objection. And Latham &
3 Watkins agreed to a reduction of 26,500 dollars. These amounts
4 are twenty percent of the U.S. trustee's -- the fees that the
5 U.S. trustee questioned, and so it's uniform.

6 THE COURT: And it generally relates to use of law
7 school graduates who haven't yet been admitted to the bar and
8 some are associates with a couple of firms, I guess.

9 MS. LEONHARD: That's correct. And the other issue,
10 too, Your Honor, was billing for clerical time incurred by
11 paraprofessionals. But I think this resolution is satisfactory
12 to the U.S. trustee.

13 THE COURT: Okay.

14 MS. LEONHARD: With respect to Pricewaterhouse and
15 WilmerHale, the issue was disclosure of their relationship, and
16 in -- when this issue, when the U.S. trustee identified this
17 issue, I, on behalf of the U.S. trustee went back and looked at
18 every retention application Rule 2014 disclosure fee
19 application, everything related to those two professionals.
20 And while it is the U.S. trustee's view that the disclosure of
21 the relationship between the debtors, Pricewaterhouse and
22 WilmerHale could have been clearer, after discussions with Mr.
23 Sherbin at the reorganized debtors and WilmerHale and review of
24 documents, the U.S. trustee's satisfied that there's no
25 violation of Rule 2014 of this disclosure, and so therefore,

1 has no further objection to the award of fees to WilmerHale and
2 withdraws the request for disgorgement.

3 The second issue with respect to WilmerHale and
4 Pricewaterhouse was that Pricewaterhouse received the payment
5 of fees which were billed as expenses to the debtors, and
6 generally, this is not acceptable because it circumvents the
7 Section 327 retention requirements. However, based on my
8 discussions with WilmerHale and the reorganized debtors, it
9 appears that there was a valid reason to have this arrangement
10 and that everybody knew about it, and it had been fully
11 disclosed to all of the parties of interest in the case. So
12 therefore, the U.S. trustee has no further objection to
13 Pricewaterhouse's fees.

14 THE COURT: Well, Pricewaterhouse, I think, did submit
15 time records, right?

16 MS. LEONHARD: It did.

17 THE COURT: Although they weren't in tenths of an
18 hour.

19 MS. LEONHARD: And they were also filed under seal
20 because of the sensitive nature.

21 THE COURT: Oh, but that's because it was an
22 investigation.

23 MS. LEONHARD: Correct. And so they did file time
24 records and the arrangement was made because of the sensitive
25 nature of that investigation, and there was a valid reason.

1 And so the U.S. trustee is satisfied with the explanation.

2 THE COURT: Okay.

3 MS. LEONHARD: So Howard & Howard is the final
4 objection, and that, again, was the request for future fees.
5 But the U.S. trustee agrees with the debtor that these -- any
6 fees can be paid in the ordinary course of business.

7 THE COURT: Because they're postconfirmation --

8 MS. LEONHARD: Correct.

9 THE COURT: -- fees?

10 MS. LEONHARD: Correct.

11 THE COURT: Okay.

12 MS. LEONHARD: So in closing, Your Honor, unless the
13 Court has any other questions, I'd just like to thank the
14 professionals for their cooperation in resolving these
15 objections, and I have nothing further. Thank you.

16 THE COURT: Okay. Can I ask you -- and maybe Mr.
17 Butler, although I don't think you sat on this fee committee --
18 obviously, there's a cost involved in a committee like this,
19 but it was my view that given the size of this case and the
20 projected size of the fees that it would be worthwhile. Did
21 you feel it was worthwhile to have the review occur the way it
22 did in this case?

23 MS. LEONHARD: I think I do, Your Honor. I think that
24 the fee committee operated very well, and in fact, you know,
25 reviewing LC -- Legal Cost Control's application, also, the

1 amount of money paid to them, a couple million dollars,
2 actually resulted in quite a lar -- a much larger return, in
3 terms of disallowed or resolved fees. I think it was very
4 helpful in this case.

5 THE COURT: Okay, thank you.

6 MS. LEONHARD: Thank you.

7 MR. BUTLER: Your Honor, turning to the professional
8 fee escrow under Article 10.3(c) of the modified plan, DPH
9 Holdings was required to transmit to the holdback escrow
10 account the aggregate amount of about 6.1 million dollars,
11 which represented the holdback on payment for professional fees
12 and expenses for allowed professional claims, the extent not
13 previously paid or disallowed. As I indicated, the fee review
14 committee reconciled the expected amounts in connection with
15 their final review, and after certain reconciliations that were
16 made, the fee review committee believes that no professionals
17 seeking payment from the professional fee escrow for an amount
18 greater than what was escrowed for that individual professional
19 at the time of the reconciliation back in October of 2009.
20 There are several professionals, KPMG, LLP, Mesirow Financial
21 Consulting, and Skadden Arps, that are seeking payment for
22 their professional fee escrow for amounts less than was
23 escrowed for such professionals, as a result of having
24 voluntarily extended fee accommodations to the reorganized
25 debtors apart from and incremental to any settlements with the

1 U.S. trustee in connection with her objection.

2 THE COURT: Will you remind me, where does the surplus
3 in the escrow go?

4 MR. BUTLER: The surplus will go back to DPH Holdings.

5 THE COURT: Okay.

6 MR. BUTLER: I think, Your Honor, the only other
7 comment that I think I would make, here, in connection with
8 this process -- and I should say, by the way, that in response
9 to your questions about the fee committee, Mr. Sheehan is here
10 as the debtors' representative, the reorganized company's
11 representative on the fee committee, and is available to answer
12 any questions Your Honor may have about that, as well.

13 Let me just also just indicate, Your Honor, there was
14 a fair amount of exchange in the written pleadings in
15 preparation for this hearing, you know, about the success of
16 the cases and about what went on here. I know from -- I'll
17 just speak briefly, now, not as representing DPH Holdings, but
18 as an applicant and as the lead counsel to the debtors
19 throughout their Chapter 11 cases. This was, obviously, a
20 complex, long and difficult case. I think it is -- it turned
21 out to be the fulcrum restructuring in the automotive industry,
22 and I think that the professionals assembled here, regardless
23 of the constituencies they represented, are proud of the fact
24 that this case was resolved through a modified plan, which
25 provided for the payment or satisfaction of all administrative

1 claims and for a contingent recovery to the unsecured
2 creditors, which I think some of us believe, in fact, will be
3 paid, ultimately, in connection with the recovery of the
4 automotive industry. And certainly, there were, at many
5 moments in this case, opportunities for this case to have gone
6 sideways and to have ended up in a liquidation, which would
7 have, among other things, threatened the global automotive
8 supply chain, if not have broken it.

9 And so from the company's perspective -- or, excuse
10 me, from my perspective, personally -- the company spoke
11 through their own statements and we addressed it in our
12 statement back to the Court -- this was, I think, on many
13 levels, and I'll just speak from Skadden's perspective, this is
14 a case, if you actually looked at our engagement letter which
15 was Exhibit B to our retention application and to our final fee
16 application, on many levels, and if you looked at the actual
17 contract between Skadden and Delphi Corporation, this was a
18 transaction in which the fee enhancements and other provisions
19 of that agreement that had been previously negotiated, actually
20 were triggered and came into play. Instead, we stand before
21 you with having agreed to something close to a ten percent
22 discount off of our standard rates. I think the reason for
23 that, at the end of the day, is that everyone in this case,
24 including the professionals, recognized the shared sacrifices
25 that occurred in this case, and whatever the contracts may have

1 otherwise said, the right outcome, we believe, are the
2 applications that are before the Court.

3 THE COURT: Okay.

4 MR. BUTLER: Thank you, Your Honor.

5 THE COURT: Okay. Does anyone else have anything to
6 say on the fee applications? All right. Well, I have reviewed
7 the final applications, as well as the U.S. trustee's objection
8 and the responses to it. And I will note that I think that the
9 agreements reached with the U.S. trustee are fair and
10 reasonable and properly reflect the issues raised by the U.S.
11 trustee. Where the U.S. trustee has agreed to withdraw her
12 objection, I believe that she's done so for a good reason. The
13 largest objection was to an element of -- or, a couple of
14 elements of Rothschild's transactional fees, but Rothschild has
15 adequately answered the questions raised in the objection with
16 regard to these fees and their calculation.

17 The one issue that still gave me some pause was the
18 Wilmer Cutler/Pricewaterhouse issue, given the fact that
19 retention under 327(a) and disclosure under 2014 are absolute
20 requirements under the statute of the case law for the ability
21 to be compensated. However, I believe, as the U.S. trustee has
22 concluded, that the authorized retention of Pricewaterhouse
23 which was approved retroactive to January 2006 contemplated the
24 work that it did in connection with the audit committee work
25 and for or with WilmerHale at that time and that the work was

1 sufficiently disclosed to justify the compensation in this
2 instance.

3 As far as whether I had any other issues with the fee
4 applications, I don't. I believe they should be awarded in the
5 amounts agreed to or otherwise, where there was no objection,
6 as sought. The -- well, the fact is, in the past, when I was a
7 practicing lawyer, I often found amusing when a bankruptcy
8 Court cited to itself, but I dealt with the standard for
9 approving fee applications in In re: Cenargo International,
10 PLC 294 B.R. 571, Bankr.S.D.N.Y. 2003, and I think that there's
11 been no change in the case law since then that would alter my
12 approach to reviewing professionals' fee applications in
13 Chapter 11 cases. As I said in that case, the standard is what
14 would a reasonable professional have done at the time.
15 Clearly, this case, at various points, contemplated a much
16 larger distribution, not only to unsecured creditors, but also
17 a distribution to shareholders. I, in fact, appointed an
18 equity committee to protect the interests of shareholders. I
19 do not believe that the ultimate distributions in this case,
20 and the fact that they're obviously much lower than had been
21 contemplated during the course of the case, are in any way
22 attributable to the work of the professionals or the exercise
23 of their judgment, and consequently, I believe that their fees
24 should not be reduced in light of the fact that creditors and
25 shareholders are justifiably disappointed with the

1 distributions in the case. The outcome of the case, I believe,
2 is instead attributable to the nature of the debtors' business
3 and the environment in which it operated, and in fact, it seems
4 to me the professionals throughout the case not only did their
5 work properly, but in fact, contributed to the fact that there
6 are distributions at all in the case.

7 So in light of that, I'll approve the applications.

8 I know you circulated an order yesterday. I think
9 there have been some changes since then.

10 MR. BUTLER: I think we've circulated an order that's
11 been adjusted. We have -- and we'll make sure, Your Honor,
12 with chamber, that we present the final reconciled order that
13 we've reviewed with parties.

14 THE COURT: Okay, thank you.

15 MR. BUTLER: Thank you. Your Honor, at this time, can
16 the parties that were --

17 THE COURT: Yes, all of the professionals and their
18 representatives can be excused, who were here on that aspect.

19 IN UNISON: Thank you, Your Honor.

20 (Pause)

21 THE COURT: But I would ask you all to leave so that
22 we could pursue the remaining matters.

23 Okay.

24 MR. LYONS: So much for my audience, I guess, Your
25 Honor.

1 THE COURT: Yeah. Well --

2 MR. LYONS: Your Honor, if we could, we could turn --
3 why don't we wait a few seconds, here.

4 MR. WHEATLEY: Your Honor, Nathan Wheatley, appearing
5 on behalf of Williams Advanced Materials as part of the
6 adversary proceedings. Am I to understand that the Court would
7 like to proceed without anyone on the telephonic line?

8 THE COURT: I'm sorry, I didn't hear the last thing
9 you said.

10 MR. WHEATLEY: I'm sorry, Your Honor. Nathan
11 Wheatley. I was appearing on behalf of my client, Williams
12 Advanced Materials, a defendant in one of the adversary
13 proceedings as part of the scheduled pretrial conferences. I
14 wasn't sure if the Court wanted everyone off the telephonic
15 lines. I've just been waiting for the pretrial conference on
16 my adversary proceeding.

17 THE COURT: All right, well, I was under the
18 impression that the pretrial conferences had all been
19 adjourned. Is that correct? I think the gentleman was here
20 and spoke on that at the start of the hearing.

21 MR. WHEATLEY: Your Honor, I talked with Ms. Nagefi
22 (ph.) on, I believe it was Tuesday -- I was out of the office
23 on a hearing yesterday -- and informed her that -- she informed
24 me that there was an offer to adjourn the pretrial hearing, but
25 I informed her that I wanted to go forward with the pretrial

1 hearing because the proposed scheduling order offered by the
2 debtors that I understand was filed yesterday is objectionable
3 to my client.

4 THE COURT: Oh, well, I -- we have a hearing scheduled
5 in April on the pretrial order, which I understand the debtors
6 are proposing to have be applicable to all of the adversary
7 proceedings. And given that I expect there will be responses
8 to that proposed order by more than you, and that I have the
9 hearing scheduled on that in April, that I'll deal with those
10 issues then. I don't consider the parties bound by that order,
11 obviously, before then. And it seems to me that to the extent
12 there is to be any discovery or other activity in the adversary
13 before that date, it should only be done on a voluntary basis
14 by the parties.

15 MR. WHEATLEY: Very good, Your Honor. Just as a point
16 of clarification, would you like the objection to the proposed
17 order all filed in the bankruptcy proceeding itself, or with
18 each individual --

19 THE COURT: Yes, I think that would be best.

20 MS. COOK: Your Honor?

21 THE COURT: Yes.

22 MS. COOK: Susan Cook. I'm an attorney representing
23 another defendant, ProTech Machine. I'm from Lambert, Leser.
24 I don't know what is happening with the communication. I don't
25 know if Mr. Fisher is still in the court, but we didn't receive

1 notice that this was going to be adjourned. We didn't receive
2 notice the last time it was going to be adjourned until
3 probably the day. And quite frankly, they mistakenly entered a
4 default in this matter against my client. So I don't know what
5 can be done to improve the communication, but it is definitely
6 lacking, here.

7 THE COURT: Okay, did you file an answer?

8 MS. COOK: Yes, yeah.

9 THE COURT: All right.

10 MS. COOK: We filed an answer well within the time,
11 and the response, when we finally got a hold of Mr. Fisher, was
12 he didn't really know what had happened.

13 THE COURT: All right.

14 MS. COOK: He didn't withdraw the request. But
15 that -- it seems like we don't -- we're never told. I mean,
16 I've been sitting on the line, now, and I had no idea that the
17 pretrial had been adjourned.

18 THE COURT: Well, Mr. Fisher spoke at the beginning of
19 the hearing on the adversaries, so I'm sympathetic to your not
20 being told of the adjournment. I don't understand why you
21 didn't speak up when he was speaking. He's not here now.

22 MS. COOK: I guess I didn't know that --

23 THE COURT: I'm going to instruct --

24 MS. COOK: I thought that the matters were being put
25 to the last part of the call, so I mistaken --

1 THE COURT: No, I --

2 MS. COOK: I guess I misunderstood what was being
3 said.

4 THE COURT: Okay, no, I only put the claim objections
5 to the last part. I dealt with the adversary proceedings at
6 the beginning of the hearing.

7 He's not here now. I'll ask Mr. Lyons to speak with
8 him and also to the lawyers at Togut, Segal & Segal, the
9 conflict firm, because I'm not sure which one of them is
10 representing the debtor in your adversary, to make sure that
11 they have up-to-date lists of all of their adversary counsel
12 and that they have very clear procedures in place for notifying
13 people of any requested adjournments.

14 MS. COOK: Thank you, Your Honor, and I do appreciate
15 your allowing me to participate by phone.

16 THE COURT: That's no problem. And that's generally
17 my rule for out-of-town counsel, except when they're presenting
18 evidence. So --

19 MS. COOK: Thank you.

20 THE COURT: -- you just need to make the e-mail so
21 that you can get added to the call, but other than that, you
22 should assume that the request is granted.

23 MS. COOK: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. LYONS: If I may ask Ms. Cook, who was her client?

1 I didn't catch the name.

2 MS. COOK: My client is ProTech; the adversary
3 proceeding number is 07-02690. ProTech Machine.

4 THE COURT: Okay. Is there anyone else on the line
5 who is on the line because of a scheduled pretrial conference
6 in an adversary proceeding, as opposed to a claim objection?

7 MR. ADAMS: Yes, Your Honor, I'm Robert Adams in
8 Birmingham for Simco Construction, and I misunderstood, as
9 well.

10 THE COURT: Okay.

11 MR. ADAMS: And I apologize. But if I'm understanding
12 now, this matter will come back before the Court on April 22nd?

13 THE COURT: When I hear the debtors' --

14 MR. ADAMS: Court management procedures order?

15 THE COURT: -- case management procedures for all of
16 the adversaries.

17 MR. ADAMS: Yes, Your Honor.

18 THE COURT: I would urge you and the other counsel who
19 are on the phone, you have quite a while to object. I would
20 urge you in advance of that time to reach out to the debtors'
21 counsel if you have problems with the procedures or
22 suggestions. Based on my experience in the case with regard to
23 the claims management procedures, the debtors have been
24 prepared to make changes to omnibus procedural orders in
25 response to the other sides' comments, and obviously, if

1 they're not willing to, I'll hear them. But that may well
2 narrow down some of the issues.

3 MR. ADAMS: Thank you, Your Honor.

4 THE COURT: Okay.

5 MS. COOK: Thank you, Your Honor.

6 MS. REITER: Your Honor, my name is Susan Reiter. I'm
7 counsel for one of the adversary defendants, Blair Strip Steel
8 Company, and I was equally misunderstanding the procedure
9 today. I did not know of the adjournment, and I have been
10 waiting on the phone, also.

11 THE COURT: Okay, well, I will say there was a slip-
12 up, here, I think, as far as notifying you all of the
13 adjournments. Really, when I say that there should be lists, I
14 mean, I think that, frankly, that the parties should exchange
15 their e-mail addresses and the debtors counsel should have an
16 e-mail list so they can send out notices on a ready basis to
17 everyone to make sure that there's no confusion.

18 MS. REITER: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. WHEATLEY: And, Your Honor, Nathan Wheatley again.
21 Just to clarify going forward some more, am I to understand,
22 then, that any further attempts to address omnibus issues or
23 protocols for all of the adversary proceedings will be heard as
24 part of the omnibus hearing from the main bankruptcy, as
25 opposed to separate hearings for each of the adversary

1 proceedings?

2 THE COURT: Yes, I mean, technically, the agenda for
3 the April -- what is it, 22nd? -- 22nd hearing will be both on
4 the main case and on the adversaries. But I contemplate
5 entering an order that will be applicable to each of the
6 adversaries.

7 MR. WHEATLEY: Very good, Your Honor.

8 THE COURT: Okay.

9 All right, so why don't we proceed, then, to the claim
10 objection portion of the hearing.

11 MR. LYONS: Yes, Your Honor. Your Honor, the first
12 omnibus objection is the forty-fourth omnibus objection which
13 was filed and served in accordance with the claims procedure
14 order including the individual particularized notice that went
15 to all claimants. Your Honor, this is going to be the last
16 omnibus objection that deals with prepetition claims because
17 the claims objection deadline for prepetition claims expired on
18 February 3rd. So this is the last objection that deals with
19 prepetition claims in an omnibus matter.

20 There were a total of 136 proofs of claim, originally,
21 on the objection, plus another 207 scheduled liabilities that
22 we objected to pursuant to the plan to, in essence, object to
23 our schedules, for a total of 343 total claims and scheduled
24 liabilities. Five claims were withdrawn from the objection,
25 and those related to, primarily, the fiduciary counselors'

1 claims who consensually agreed to withdraw their claims from
2 the dockets. So those are actually now no longer -- or will no
3 longer be on the claims register. Thirty-seven claims covered
4 by responses were filed, and then five scheduled liabilities
5 covered by responses were filed. So there will be a total of
6 296 claims on the order which we submitted yesterday to Your
7 Honor; 94 relate to claims that have been filed totaling 78
8 million, and then 202 scheduled liabilities that were subject
9 to objection, totaling 21.7 million.

10 The bulk of the objections were just to account for
11 cure payments made during the Chapter 11 cases, and also to
12 preserve rights under 502(d) of the Bankruptcy Code relating to
13 the avoidance actions. So that was the main purpose of the
14 omnibus objection. I can go into some more details, Your
15 Honor, but I know at our last omnibus hearing, this was the
16 level of detail that I explained, Your Honor.

17 THE COURT: No, I don't -- the only -- I have not had
18 a chance to look at the order. The only issue I had was the
19 502(d) objections are obviously subject to 502(j) if, in fact,
20 either the defendant prevails or the defendant pays. And I
21 just want to make sure the order reflects that.

22 MR. LYONS: We will --

23 THE COURT: That it's not a permanent disallowance.
24 It's a fairly arcane section of the Code, and I have to assume
25 that that right wouldn't be self-evident to the claimants, if

1 they get to the order. So I'd like that to be clear in the
2 order.

3 MR. LYONS: Okay, we will do so, Your Honor. And
4 again, the purpose was to just preserve rights under 502(d).

5 THE COURT: No, I understand, but I don't want them to
6 be confused to think that they're barred forever and that they
7 can't cure it either by paying or winning.

8 MR. LYONS: Okay, we will recheck the order and make
9 sure that's clear, Your Honor.

10 THE COURT: Okay.

11 MR. LYONS: So Your Honor --

12 THE COURT: But other than that, I will grant the
13 relief requested because, as you have now requested it, it's
14 unopposed. There's been due and adequate individualized notice
15 on the claims procedures and the omnibus objection itself sets
16 forth a valid basis for shifting the burden back to the
17 claimant in each case, which the claimant has not taken up. So
18 I'll grant the relief with that one change on the 502(d)
19 claims.

20 MR. LYONS: Thank you, Your Honor.

21 Next is the forty-fifth omnibus objection, and this
22 objection covers administrative claims. We've made a lot of
23 progress, so far, on the administrative claims, and this is the
24 next step in progressing and administering those claims. There
25 were a total of fifty-four claims that were on this objection,

1 and actually, I misspoke before: the five that were withdrawn
2 were actually the fiduciary counselors. So those are now
3 withdrawn from the docket itself. Seven claims covered by
4 responses were filed, so there are a total of forty-two
5 administrative expense claims on the order that we submitted
6 yesterday and also described in our apply. Mostly, these
7 claims relate to duplicate claims. There are some OPEB claims,
8 severance, transferred workers compensation claims that went
9 over to either GM or New Delphi, and then some modified and
10 allowed claims for severance and other valid administrative
11 claims. So Your Honor, we again serve this in accordance with
12 the claims procedure order with the particularized notice, and
13 we'd ask Your Honor respectfully to enter the order.

14 THE COURT: Okay, and these are separate than the two
15 or three admin claims that are in the contested portion that
16 are on for today?

17 MR. LYONS: Yes.

18 THE COURT: Okay.

19 MR. LYONS: This only deals with --

20 THE COURT: We never dealt with these claims before?

21 MR. LYONS: Correct, Your Honor.

22 THE COURT: All right.

23 MR. LYONS: Because the second step --

24 THE COURT: All right.

25 MR. LYONS: -- is to notice them under the

1 procedures --

2 THE COURT: Right.

3 MR. LYONS: -- once they get adjourned.

4 THE COURT: Does anyone want to address this relief?

5 Okay, I will grant the omnibus objection as modified
6 on the record to reflect that the relief that's being sought
7 and that I'm granting is uncontested. And again, it's based
8 upon the averments in the omnibus objection which set forth a
9 valid basis to shift the burden onto the administrative
10 claimant to the extent it needs to be shift in connection with
11 an administrative claim, and the claimants have not met that
12 burden and have not opposed the relief.

13 MR. LYONS: Thank you, Your Honor.

14 That's the last item on the omnibus hearing agenda,
15 Your Honor, so with that, the omnibus hearing is concluded,
16 unless Your Honor has anything to discuss.

17 THE COURT: No, I don't. So why don't we proceed,
18 then, to the sufficiency hearings and then the two evidentiary
19 hearings.

20 MR. LYONS: Very good, Your Honor. We are now looking
21 at the thirty-first claims hearing agenda, and a number of
22 matters have been adjourned in the agenda. Another matter,
23 although it didn't make it onto the agenda because we filed it
24 earlier, but I understand Your Honor also adjourned the New
25 York State environmental objection.

1 THE COURT: I did. I saw your -- maybe it was you,
2 maybe it was one of your colleagues -- letter in response.
3 I -- rather than -- since the whole matter seemed to rest on
4 whether GM has assumed this obligation or not, it seemed to me
5 that it's something that's probably better dealt with a month
6 or so from now, including maybe clearing up and getting GM
7 admit that it assumed the obligation, in which case, I think it
8 would significantly reduce the amount of dispute.

9 MR. LYONS: I'm hopeful the parties will be discussing
10 that between now and the next hearing, Your Honor.

11 THE COURT: Okay.

12 MR. LYONS: And hopefully that can be consensually
13 resolved.

14 THE COURT: Okay. But I just want to make sure,
15 there's no one on the phone on the New York State Departmental
16 of Environmental Conservation claim? Okay. So that's
17 adjourned to the next omnibus date.

18 MR. LYONS: Okay, Your Honor. With your permission,
19 I'll skip over the matters that are noted as continued or
20 adjourned in the agenda. We would expect that all of these, or
21 at least a substantial number of these, would be reset for the
22 April 22nd hearing --

23 THE COURT: Okay.

24 MR. LYONS: -- to be heard.

25 THE COURT: All right, I'm just going to ask you again

1 to keep in mind that -- and only you really know this best, is
2 that it's hard for me to do more than three or four that are
3 truly contested or that raise serious issues that involve
4 substantial briefing and/or development of facts. So try to
5 keep those to about that limit.

6 MR. LYONS: Understood, Your Honor, and if we do have
7 a need to address more of those, as in the past, we'll reach
8 out to chambers and see if there's a possible --

9 THE COURT: You can get other dates.

10 MR. LYONS: -- spillover date that we can get, Your
11 Honor.

12 THE COURT: Definitely you can get other dates for
13 those.

14 MR. LYONS: Okay, Your Honor, so I will turn, then, to
15 item 6 on the agenda, contested matters, and that's the New
16 York State matter that has been adjourned, so we'll skip over
17 that.

18 Item number 7 is the sufficiency hearing regarding
19 claims of PLA Holdings, LLC. Your Honor, this involved pre-
20 spinoff, that is, pre-spinoff from GM, originally, back in
21 1999. PLA has confirmed to us that it's not going to file a
22 response, and they're not going to oppose the relief that
23 we've --

24 THE COURT: Okay.

25 MR. LYONS: -- that we're seeking here.

1 THE COURT: All right. I -- that was a good idea of
2 theirs, because I believe that the claim objection should be
3 granted for two reasons. First, this is -- to the extent it is
4 a claim at all, and PLA has couched it as -- clearly as a
5 contingent claim, it's a contingent and unliquidated claim for
6 reimbursement or contribution, and therefore, would be
7 disallowed under Section 502(e)(1)(B). There's no evidence of
8 any actual loss, leaving aside the issue of whether any such
9 loss would be covered by the agreement. But it's disallowable
10 under 502(e)(1)(B).

11 MR. LYONS: Thank you, Your Honor.

12 The next item, item number 8, is the sufficiency
13 hearing regarding the claims of Heraeus Amersil, a.k.a. Heraeus
14 Tenevo, and Milliken & Company. Your Honor, we did file an
15 omnibus reply in support of our sufficiency notice to expunge
16 the claim. No response has been filed. We have not received
17 the same kind of affirmative "we're not going to pursue this"
18 as we did from PLA.

19 THE COURT: Okay.

20 MR. LYONS: But nonetheless, we believe the relief is
21 warranted as this liability all occurred before the spinoff.
22 It is contingent in nature, and in any event, there is no
23 liability under CERCLA for exposure before this company ever
24 existed.

25 THE COURT: Okay. I will grant the objection. The

1 claims and the response to the omnibus objection both make it
2 clear that these are true contingent, unliquidated claims for
3 contribution or reimbursement. In fact they're couched as
4 claims to the extent, if any, that either Heraeus Amersil or
5 Milliken & Company may be responsible themselves and have
6 contribution claims. So they're disallowable under Section
7 502(e)(1)(B) and the case law authority that the debtors cite
8 including In re: Charter Company, 862 F.2d 1500 Eleventh
9 Circuit, 1989 and In re: Hexcel, 174 B.R. 807, 813 (Bankr.
10 N.D.Cal 1994). It seemed to me that there would only be one
11 potentially narrow circumstance where the debtors might be
12 liable under CERCLA, ever, rather than address that issue at
13 this point, and it would be under the agreement, which has not
14 been particularly briefed, with GM. I won't address that
15 alternative basis since there's no evidence in the claim or in
16 the record -- or, in the claims or the record that any
17 liability was incurred at any time.

18 MR. LYONS: Okay, thank you, Your Honor.

19 Next -- that is it for the environmental objections,
20 as I'll characterize them. Item number 9 is the sufficiency
21 hearing regarding the claims of Joyce Skillman, Audrey Amort
22 Carbrera, Sandra Hamlin, Jeffrey A. Miller, Dwight L. Goodin,
23 William E. Cross, and Scott A. McBain. Your Honor, we did file
24 the notices and served them on the parties just listed and also
25 filed a reply in support of our notice of sufficiency hearing.

1 It's probably easiest, Your Honor, to group these
2 claimants depending upon the nature of the claims that have
3 been filed in order to look at the individual merits of the
4 objection. First, Your Honor, two claimants, Ms. Skillman and
5 Ms. Hamlin, these relate to qualified domestic relations
6 orders, also known as quadros, where basically, pursuant to a
7 domestic relations settlement, they were entitled to receive
8 what their other spouse received, or some portion of that. It
9 was, in essence, an alternate payee. That does not, of course,
10 give them any greater rights than the original payee had, and
11 since the original payee had certain OPEB claims, salaried
12 OPEB, based upon Your Honor's prior ruling, the salaried OPEB
13 claims were not vested and were terminable at will. So when
14 the salaried OPEB was terminated, the right to receive any
15 payment under the quadros likewise ceased. So those are the
16 two claims regarding Ms. Skillman and Ms. Hamlin.

17 THE COURT: Okay, is there anyone present or on the
18 phone on behalf of, or is Ms. Skillman, Ms. Hamlin, or Ms.
19 Amort Carbrera on the phone?

20 Okay, I have reviewed each of their responses. As you
21 said, they're premised upon divorce decrees -- or, child
22 support and/or divorce decrees where they have been assigned
23 the rights of their spouse under or in connection with OPEB.
24 As I previously ruled in this case, based on my review of the
25 underlying right to OPEB, the debtors had the ability to

1 terminate OPEB at will; that's the law of the case. I'm not
2 going to change my view now. And consequently, each of those
3 three claims, the Skillman, the Amort Carbrera claim, and the
4 Hamlin claim are disallowed.

5 As with the last matter, Heraeus Amersil and Milliken
6 claims, I think you should submit separate orders on these, now
7 that we've gotten to this stage of the proceeding.

8 MR. LYONS: Okay, then we will do the same for Ms.
9 Skillman, Carbrera, and Hamlin, as well.

10 THE COURT: Right.

11 MR. LYONS: Okay, very good. All right, Your Honor,
12 next is the claim of Jeffrey Miller. Mr. Miller seeks a claim
13 relating to various restricted stock unit grants that were made
14 prepetition, as well as other stock that he had held. In
15 addition, he had a claim for 37,000 dollars under the KECP
16 (ph.) plan. I think, Your Honor, after further reviewing his
17 claim, we would adjourn the 37,000 dollar portion of the KECP
18 so we can investigate it and see whether he's been paid. With
19 his remaining claims for equity, though, Your Honor, we think
20 that's rather straightforward that that is not a claim, should
21 be disallowed, and at a minimum, possible, a 510(b)
22 subordinated claim that's -- won't get distribution.

23 THE COURT: But the plan classifies those types of
24 claims, 510(b) claims, and provides for their treatment, right?

25 MR. LYONS: Correct. I don't think Mr. Miller's has

1 asserted any kind of fraud in the purchaser sale, though. I
2 think his claims really are just equity interest that would
3 be --

4 THE COURT: That's true.

5 MR. LYONS: -- technically not a proof of claim and
6 should be expunged.

7 THE COURT: Okay. All right. Mr. Miller, or you on
8 the phone, or is anyone here on his behalf?

9 All right, the debtors have done what I was going to
10 recommend. It seemed to me the KECP claim, to the extent it's
11 not satisfied, is a claim. And I'm happy to adjourn that
12 matter so you can see whether it's been dealt with. The
13 remaining portion of the claim which is premised upon an
14 alleged oral agreement to continue to work with "New Delphi"
15 and a right to stock grants and options, I will disallow. If,
16 to the extent that the oral agreement is solely to have stock
17 grants and options, that's an equity right, not a claim. And I
18 also believe that the existence of such an agreement, as
19 alleged, is too amorphous or vague, given the circumstances
20 during which it was made, to be enforceable. So that would be
21 an alternative basis for disallowing the claim.

22 MR. LYONS: Thank you, Your Honor.

23 The claim of Dwight L. Goodin, Your Honor, this is
24 what we would believe to be a duplicate administrative claim.

25 THE COURT: And I think he's agreed with you. As I

1 read -- Mr. Goodin, are you on the phone? As I read his
2 response, he acknowledges that he entered into a settlement
3 with the debtors for 400 -- same amount -- 409,000, and that he
4 filed the admin claim before then. He wasn't sure whether he
5 had a deal. But I think he acknowledges that this is a
6 duplicate of the unsecured claim under the settlement, and
7 moreover, he waived his other rights as part of the settlement.
8 So the admin claim should be disallowed as, A, not entitled to
9 admin treatment, but B, because as an unsecured claim, it's
10 duplicative of the other claim.

11 MR. LYONS: Very good. So the order will expunge the
12 admin claim, which he agrees.

13 THE COURT: Yes. Yeah, because he has the other
14 claim.

15 MR. LYONS: Correct. The next is William E. Cross.
16 This is an individual who, again, believes he's entitled to
17 OPEB, certain OPEB pursuant to a settlement agreement. We have
18 not been able to locate any settlement agreement. He did not
19 attach it to his proof of claim. But, certainly, there's no
20 proof here that somehow Delphi modified its rights to terminate
21 the salaried OPEB for any reason. So on that basis, Your
22 Honor, we believe that claim should be expunged.

23 THE COURT: Okay. Is there anyone here on behalf of
24 Mr. Cross, or is Mr. Cross on the phone?

25 Let me just -- I don't believe he -- what number is

1 this under? This is under 6?

2 MR. LYONS: On the agenda, Your Honor?

3 THE COURT: No -- yes, I'm sorry.

4 MR. LYONS: It's item number 9.

5 THE COURT: Excuse me.

6 Yes, he attaches the settlement agreement, but that
7 merely entitles him to participation in the OPEB. It doesn't
8 change the terms of the OPEB. So consistent with my ruling
9 earlier in the case, what he received was a right to OPEB so
10 long as the debtors kept it in place. And the debtors had the
11 right to terminate it without creating a claim for future
12 benefits, so -- and I took his claim to be one for future
13 benefits, not for amounts that were accrued before the
14 termination. So the claim should be disallowed on the basis of
15 the lack of a right to OPEB after the debtors terminated the
16 plan.

17 MR. LYONS: Okay, Your Honor. And then the last one
18 is Mr. Scott McBain. And he put a claim in for the U.S.
19 Executive Recognition Grant. That was waived under the express
20 terms of the KECP when he participated in that, so that claim
21 has been waived.

22 THE COURT: Right. Is Mr. McBain on the phone, or
23 anyone on his behalf, or present?

24 All right, the debtors attach the waiver, which is
25 attached as Exhibit C, where he clearly did waive this right in

1 return for the KECP. So in light of that, I'll grant the
2 objection.

3 MR. LYONS: Item number 10, Your Honor, is the
4 sufficiency hearing regarding claims filed by FHBC America
5 which were subsequently transferred to Contrarian Funds. The
6 FHBC proof of claim number is 6991, and another proof of claim
7 which we believe to be the -- will be the surviving claim is
8 16386. These are duplicate claims, and in fact, the claim
9 16386 was fully satisfied by cure and has already been expunged
10 on the basis of that; 6991 is a mere duplicate of that. And on
11 that basis, Your Honor, we would request Your Honor to expunge
12 6991, as well.

13 THE COURT: Okay. I guess that leaves open who was
14 entitled to the payment -- the cure payment. But because
15 Contrarian says it was assigned -- 16386 was assigned to it.
16 But given the cure payment, the debtor shouldn't be responsible
17 for it. So the order should reflect that the claims -- I'm
18 sorry, that 16 -- I'm sorry, that 6991 is expunged as
19 duplicative of 16386, and that any rights as between Contrarian
20 and its assignor in respect of that claim are preserved as
21 between those parties.

22 MR. LYONS: Okay.

23 THE COURT: And I'm sorry, 16386, are you seeking that
24 that be disallowed now, or --

25 MR. LYONS: No, that's already been disallowed.

1 THE COURT: It's already been disallowed.

2 MR. LYONS: Right.

3 THE COURT: Because -- right, okay.

4 MR. LYONS: 6991 was just a duplicate claim --

5 THE COURT: Right.

6 MR. LYONS: -- that was still on the register.

7 THE COURT: Okay, fine.

8 MR. LYONS: We will add that language.

9 THE COURT: And then there was this other one, which I
10 think -- 14878 -- it doesn't -- there's no -- Contrarian
11 doesn't oppose of the disallowance of 14878, so I guess that
12 should be in the order, too, right, since it was duplicative of
13 16447?

14 MR. LYONS: Your Honor, I need to check that.

15 THE COURT: Maybe that's already been dealt with in an
16 omnibus? I'm not sure.

17 MR. LYONS: I believe it has, Your Honor.

18 THE COURT: Because in the reply, Contrarian says we
19 don't dispute that that should be disallowed. You should just
20 go back and check to see if it's already been dealt with in the
21 omnibus order.

22 MR. LYONS: I'll check. I suspect it is because the
23 time Contrarian filed its --

24 THE COURT: Right.

25 MR. LYONS: -- reply --

1 THE COURT: Would be --

2 MR. LYONS: -- it was before we paid the cur.

3 THE COURT: The order would have come out after that.

4 MR. LYONS: Okay, Your Honor, item number 11, moving
5 on, we have the sufficiency claims of Michael Potter and Lance
6 Weber. Your Honor, they have asserted claims for the loss --
7 primarily for the loss and value of their shares of stock.
8 They also allude to certain wrongdoing in connection with the
9 purchase and sale. Your Honor, I guess this might fall into
10 the category that we were discussing earlier, whether, you
11 know, is it truly a claim on behalf of equity, or is it a claim
12 based upon -- in connection with the purchase of the equity and
13 alleging wrongdoing, which, of course, is subordinated under
14 510(b).

15 THE COURT: And also separately treated under the
16 plan.

17 MR. LYONS: And separately treated under the plan. I
18 guess -- pardon me, Your Honor -- if we could -- perhaps in the
19 order, just to give us comfort, to say that either they are
20 claims on behalf of equity, which are disallowed, or would be
21 subordinated under 510(b) so at least we have the
22 classification clear for purposes of the plan.

23 THE COURT: Right. I mean, frankly, I don't think
24 they set forth a claim anyway, but conceivably, they might have
25 a right to amend the claim to state the fraud with sufficient

1 particularity. But I will -- to the extent the claim is based
2 on an equity interest, it's disallowed as an equity interest.
3 To the extent it's premised upon a claim based upon the
4 purchase or sale of stock, which would be the only alternative
5 basis for the claim, it's subordinated under Section 510(b),
6 and the claim, it is relegated to the treatment of such claims
7 under the plan, pursuant to 1141(d).

8 MR. LYONS: Very good.

9 THE COURT: And those -- there would be no other
10 aspect to this claim. Those are the only two conceivable bases
11 for the claim.

12 MR. LYONS: Right, and we'll make note in the claims
13 register because this may -- to just clearly that it'll be in a
14 510(b) provisional category for now, which, of course, would
15 not get a distribution.

16 THE COURT: Okay.

17 MR. LYONS: Your Honor, we have three remaining
18 matters, and I'm not sure which order you'd like to take them.
19 We have the splinter unions matter. I know we had briefed that
20 per Your Honor's --

21 THE COURT: I would like to take Mr. Dettinger, and
22 then Mr. Gardner, and then the unions.

23 MR. LYONS: Very good. Your Honor, Mr. Dettinger
24 filed his response. This is an evidentiary matter since it
25 deals with -- well, you know, honestly, Your Honor, it could

1 very well be a sufficiency matter, as I think through it,
2 because there is no dispute as to the SERP amount. Mr.
3 Dettinger agreed to the SERP amount of 289,538. He filed an
4 administrative claim because he believes that that amount
5 reached in settlement of the SERP claim, which, of course, is a
6 prepetition program, should be entitled to administrative
7 priority. Although that certainly was our hope when we had the
8 first original plan, circumstances changes and no longer
9 allowed the estate to pay SERP claims.

10 THE COURT: But doesn't the settlement agreement
11 provide there would be a general unsecured claim?

12 MR. LYONS: It does, Your Honor, and he even states as
13 much in his response.

14 THE COURT: Okay.

15 MR. LYONS: So Your Honor, we would request that his
16 administrative claim for 289,538 be expunged. And of course,
17 he would still keep his prepetition unsecured claim in that
18 amount.

19 THE COURT: Mr. Dettinger, are you on the phone?

20 MR. DETTINGER: Yes, I am, Your Honor.

21 THE COURT: Okay.

22 MR. DETTINGER: Robert Dettinger.

23 THE COURT: Okay. I do note that the -- it's
24 undisputed that the settlement agreement dealing with the SERP
25 states that the \$289,538.39 amount is a general unsecured

1 claim.

2 MR. DETTINGER: That's correct, Your Honor.

3 THE COURT: Since your claim is premised upon that
4 agreement, it seems to me that that would be the treatment of
5 the claim, as a general unsecured claim.

6 MR. DETTINGER: Well, one additional, if I could
7 speak, Your Honor?

8 THE COURT: Sure.

9 MR. DETTINGER: I'm basing my entire claim, here --
10 and it is a repeat of -- my number of 17863 is a repeat of
11 16722, which was adjudicated to the 289,000 aforementioned.
12 But I'm basing my entire evidentiary hearing on the letter of
13 February the 5th, 2009, which states emphatically that Delphi
14 has a right to terminate SERP, which they do, and they did
15 terminate, as you know, last April. But they said they
16 would -- this termination of SERP would not affect the
17 settlement which would, apparently, as I investigated it
18 further by talking to Debra Alexander of Delphi, at the time,
19 said that the amount would be paid at the exit of bankruptcy.
20 And so what I'm saying is that, in effect, was -- whether it
21 was a contract of adhesion or a promise or whatever it was,
22 obviously, they did the first part in the letter. They stopped
23 SERP. But they never paid the settlement.

24 THE COURT: But this --

25 MR. DETTINGER: And so that's what I'm basing my claim

1 on.

2 THE COURT: But the settlement doesn't say that it
3 will be paid in cash, right? It just says it will be treated
4 as an unsecured --

5 MR. DETTINGER: It -- it was -- yeah, that's what it
6 says in, I think, in the court documents. When I did talk to
7 Delphi at the time, it was said that it would be paid in cash
8 and stock at the time. They did not know what the formula
9 would be; that would be in the final plan.

10 THE COURT: Okay, see, Mr. Dettinger, it's -- the
11 premise for the settlement is a prepetition right under the
12 SERP. And I, frankly, wouldn't have approved the settlements
13 if it elevated those rights into administrative claims. the
14 difference between a general unsecured and administrative
15 claim, among other things, is that an administrative claim, as
16 long as the case stays in Chapter 11, has to get paid -- it
17 must get paid in cash in full on the effective date of a plan,
18 where as a general unsecured claim gets paid only what general
19 unsecured creditors get paid, and as you've said, that may be
20 cash, it may be stock. It depends on what the plan provides.
21 And as I said, I would not have elevated a general unsecured
22 claim based on a prepetition agreement to admin claim status
23 and I don't think the agreement does that.

24 So consistent with the terms of the agreement, and
25 frankly, consistent with what you just told me, the bargain was

1 that the 289,000 would be treated as a general unsecured claim;
2 the amount would be fixed and it would get what general
3 unsecured creditors get in the case. It was hoped, of course,
4 that they would get payment in full in cash or cash plus stock
5 that would be equivalent to payment in full. But there was
6 never an agreement to pay unsecured claims in full in that way.

7 So I believe the debtors' objection is appropriate and
8 that you claim to \$289,538.39 should be allowed, but allowed as
9 a general unsecured claim.

10 MR. DETTINGER: Just one question, Your Honor, and
11 that's all I have. Both you have just stated, and also the
12 lawyer stated previously that this was a prepetition claim, but
13 prepetition, I was paid a monthly SERP allotment, which was
14 like thirty-three percent and was a wage -- it was a pension,
15 according to the IRS. But the 289,000 was done postpetition.
16 It was basically a buy-out, if you want to call it that.

17 THE COURT: Right. But it's premised upon a
18 prepetition agreement, and the case law is clear that even
19 though performance may become due on a contract after the
20 filing of the bankruptcy case, the claim based upon the breach
21 of that contract is viewed as a prepetition claim if the
22 contract itself was prepetition. The fact of the breach
23 doesn't change the nature of the claim.

24 MR. DETTINGER: I understand, Your Honor.

25 THE COURT: Okay.

1 MR. DETTINGER: So it'll still stand as an unsecured
2 claim, then?

3 THE COURT: Yes.

4 MR. DETTINGER: Okay.

5 THE COURT: Yeah, and the order will reflect it's --

6 MR. DETTINGER: Then I'll withdraw my administrative
7 claim.

8 THE COURT: Okay, very well. The order will reflect
9 that it's -- that the claims docket will reflect that the
10 claims' allowed as a general unsecured claim and the other
11 claim is withdrawn. Okay, thank you.

12 MR. DETTINGER: Okay, thank you, Your Honor. I can
13 sign off, now?

14 THE COURT: Yes.

15 MR. DETTINGER: Okay, thank you.

16 THE COURT: Thanks.

17 MR. LYONS: Okay, the next matter is the sufficiency
18 objection regarding Mr. Gardner. And that's item number 16 on
19 the agenda. Mr. Gardner asserts that the debtors' offer --
20 that the debtors made an offer -- a binding offer of 800,000
21 dollars as reflected in an e-mail. Your Honor, I think it's
22 pretty clear from the e-mail, it was a cap, not an allowed
23 amount, as we were working toward the target, as Your Honor
24 recalls, back in January of 2008. We actually capped a lot of
25 claims because we were going to deal with those later; get a

1 cap and then move on. So Your Honor, I think that assertion
2 can be quickly disposed of.

3 As to the calculation of the claim, we have Mr.
4 Unrue's declaration which explains how we calculated the claim.
5 I do have an additional supplemental proffer from Mr. Unrue to
6 give you precise details on exactly --

7 THE COURT: Okay, I think I'll need that because the
8 declaration just says we did a good job.

9 MR. LYONS: -- use the methodology.

10 THE COURT: Right.

11 MR. LYONS: So Your Honor, let me address that first,
12 and I'll give you a supplemental proffer. Mr. Unrue's here --

13 THE COURT: Okay.

14 MR. LYONS: -- subject to cross-examination. I
15 guess --

16 THE COURT: Let me just make sure -- Mr. Gardner, are
17 you on the phone? No, okay.

18 MR. LYONS: Your Honor, if called as a witness, Mr.
19 Unrue would testify as follows. As noted in our pleadings and
20 in my declaration, the amount of SERP benefits for each SERP
21 eligible retiree was calculated at the direction of the debtors
22 by Watson Wyatt, a firm that provides, among other things,
23 professional actuarial services, in accordance with provisions
24 in the SERP and in accordance with GAAP.

25 In my capacity as claims administrator with past

1 experience in financial accounting, I'm familiar with the
2 methodology used by Watson Wyatt and believe it to be accurate.
3 Specifically, the calculations were made by determining the
4 present value amount of each retiree's -- eligible retiree's
5 remaining SERP benefits as of November 1st, 2005. That's the
6 first day of the first full month after the petition date. The
7 present value of November 1st, 2005 was calculated based upon
8 two factors commonly used in actuarial calculations: number
9 one, the expected mortality of the SERP claimant whose lump sum
10 benefits are being calculated, and two, the interest rate to be
11 used for discounting future payments.

12 Mortality was calculated using the 1994 uninsured
13 pensioner mortality table, UP-94, which was developed by the
14 Society of Actuaries. I understand this mortality table is --
15 or, Mr. Unrue would testify that his understanding is that this
16 mortality table is commonly used to perform actuarial
17 calculations.

18 The discount rate was calculated using a common
19 actuarial method for determining the discount rate for lump sum
20 pension payments. In particular, the interest rate on thirty
21 year Treasury bills, specifically the average daily rate for
22 each day in the month of July, proceeding the day on which the
23 lump sum was calculated.

24 So again, they use the T bill, thirty-year T bill for
25 the interest rate and the mortality table developed by the

1 Society of Actuaries to determine mortality.

2 The present value was then reduced by the amounts of
3 any monthly SERP payments made after the petition date through
4 March 1st, 2008 when SERP payments were stopped. The amount in
5 Mr. Unrue's declaration, 580,203 dollars is the calculated
6 value of Mr. Gardner's SERP claim using the above methodology.

7 And this is the same methodology that was used for all
8 of the other SERP claims, as well, all of whom, except for Mr.
9 Gardner and I believe one other didn't accept the number.

10 THE COURT: Okay.

11 MR. LYONS: So Mr. Unrue believes, based upon his
12 financial experience and also his -- in his role as claims
13 administrator that these calculations are reasonable.

14 THE COURT: Well, this is a question for either you or
15 Mr. Unrue. I looked at the basis for Mr. Gardner's
16 calculation, and it was pretty clear to me that it was premised
17 upon the cost to him of obtaining an annuity that would provide
18 the same income stream. Am I right about that? I mean,
19 they're basically two fundamentally different methods of
20 calculating the amount, here. One is the present value of the
21 claim, and the other is the cost to the debtor of replacing the
22 present -- the value of the claim.

23 MR. LYONS: Well, again, Your Honor, I've seen in
24 other -- when you look at trying to calculate a rejection
25 claim, for example, or in this case, a SERP claim. I mean, the

1 cost of annuity embeds a lot of other factors and data
2 including the profit margin --

3 THE COURT: Well, there's a profit involved.

4 MR. LYONS: Yeah, which is not insubstantial, one
5 could imagine, as well as some of the risk, you know, who
6 should bear the risk of any kind of investment loss.

7 THE COURT: Right.

8 MR. LYONS: Under a pension plan, that's really borne
9 by the administrator, whereas in an annuity, that's shifted to
10 the people who are buying the annuity. Then they pay a higher
11 price for a guaranteed stream of payments. But again, you
12 know, there is no real -- the methodology in which the annuity
13 price is calculated is not really evident at all, and I think
14 it is a very fair assumption, again, the cost of overhead, cost
15 of administration, and probably a healthy profit margin are
16 built into that calculation which skews the amount of the
17 claim.

18 THE COURT: Okay. I actually think that Mr. Gardner
19 gave the right information to the two firms that calculated the
20 cost of the annuity, but I also believe that that's not the
21 proper way to measure the damages, here. I think the damages
22 are the amount that he would otherwise have received from the
23 debtors on a present value basis. And based on the proffer,
24 including the rate used, which I believe is a reasonably low
25 rate, that the debtors calculation of damages is not only the

1 proper approach to calculating damage but it's also a
2 reasonable and appropriate methodology for doing so. So I'll
3 disallow the claim to the extent it asserts a claim above
4 \$580,203.73. I agree with you that based on the e-mail that
5 was attached to the objection -- or, the response by Mr.
6 Gardner, there was no agreement by the debtor to cap -- I'm
7 sorry, to allow the claim at 800,000 dollars. But at most,
8 even though the e-mail doesn't suggest this, it was an
9 agreement to cap the claim subject to further litigation at
10 800,000 dollars, i.e., it was Mr. Gardner's agreement to cap
11 the claim at 800,000 dollars, but, again, subject to the
12 debtors' rights to assert the claim was less than 800,000
13 dollars.

14 MR. LYONS: Thank you, Your Honor.

15 The sole remaining matter on the agenda is the
16 splinter unions matter, and I believe the way we left it is we
17 did our supplemental briefing, and if Your Honor had any need
18 for further argument or had any questions, we would make
19 ourselves available.

20 THE COURT: Okay, and do I have counsel for the unions
21 on the phone?

22 MS. ROBBINS: Yes, Your Honor. Marianne Robbins
23 appearing for the IAM and the IBW.

24 MS. MEHLSACK: And Barbara Mehlsack, Your Honor, for
25 the operating engineers.

1 THE COURT: Okay, I appreciate the extra briefing.
2 Among other things, I think it clarified that the only
3 remaining claim is premised upon the fact pattern of a claim
4 that's for the nonguaranteed pension benefits, that the pension
5 benefits are not being picked up by PBGC?

6 MS. ROBBINS: That's correct, Your Honor.

7 THE COURT: Okay.

8 MS. ROBBINS: It's premised on the nonguaranteed
9 benefits --

10 THE COURT: Okay.

11 MS. ROBBINS: -- reduced benefits.

12 THE COURT: Right, the reduced amount of benefits.
13 Now, on that score, as I see it, there are two grounds for the
14 reduced benefit claim. The first is that the collective
15 bargaining agreement as modified by the MOU gives rise to such
16 a claim itself. It's a claim for breach of the collective
17 bargaining agreement. And the second is that even if it
18 doesn't, there is a breach of fiduciary duty claim. Is that a
19 fair summary?

20 MS. ROBBINS: That is, Your Honor.

21 MS. MEHLSACK: Yes, Your Honor.

22 THE COURT: Okay, on the first point, on the breach of
23 collective bargaining agreement, the debtors contend that the
24 agreement contemplates the termination of the plan, and that
25 the claim for the reduced pension benefits or the nonguaranteed

1 benefits is caused by the termination of the plan. I think
2 that was most clearly raised in the debtors' reply brief, so I
3 just wanted to give both of you a chance to respond to that
4 argument.

5 MS. ROBBINS: Your Honor, I would be glad to respond
6 to that. It seems to me that there are very clear provisions
7 here as to what pension benefits would be provided. Now, in
8 agreeing that the employer could terminate, we do not think
9 that was meaning that the employer did not have -- that the
10 unions did not have a claim for the reduction in benefits that
11 would result. I think the clearest way that I can say that is
12 that everybody understands when they sign an agreement --
13 execute an agreement that there may be circumstances in which
14 the performance that's promised does not occur as planned. But
15 everybody also understands that in that situation, if there are
16 damages incurred because there has been a promise to provide
17 those benefits, there is a claim for those damages, and I think
18 that that is all that was being said. Yes, there could be a
19 termination, but there was no provision that if there was a
20 termination, since these benefits had been promised both
21 postpetition as well as prepetition that there would not be a
22 claim for the reduction in benefits. We think it's very
23 significant that the release was very clear that the release
24 did not apply to pension benefits and that excluded from the
25 release was any benefit that was provided by the agreement.

1 And so we think it's very clear that the intent was that these
2 were the benefits to be provided. And if, by chance, something
3 happened and they were not provided, that the claims that would
4 result were not released.

5 THE COURT: Okay. Let me -- and Ms. Mehlsack, you can
6 chime in, too, but -- and also Mr. Lyons on this point in a
7 second. Let me turn to the sentence that precedes the sentence
8 that says that the union agrees that Delphi reserves its right
9 to seek termination of the pension plan, which says that the
10 Delphi HRP -- I'm sorry, "Delphi will cause the frozen Delphi
11 HRP to pay benefits in accordance with the terms of the Delphi
12 HRP and applicable law". And here's the sentence I want to
13 focus on: "These benefits will not be reduced from the levels
14 in effect as of the date immediately preceding the effective
15 date unless they are similarly reduced for other retired Delphi
16 HRP participants." So my question is, assuming I agree with
17 you for the moment that the union's giving Delphi a reservation
18 of the right to seek to terminate the plan doesn't alter a
19 contractual obligation to provide HRP benefits, it just creates
20 a claim that's created by the termination. How -- what is the
21 response to the notion that the obligation to provide the
22 benefits is contingent upon -- or is one unless they're
23 similarly reduced for other retired Delphi HRP participants.
24 Where did Delphi reduce the benefits disproportionately?

25 MS. ROBBINS: Well, Your Honor, looking at that

1 provision, first we would note that that provision does not
2 address, specifically, a termination. It talks about a benefit
3 reduction, not a termination.

4 THE COURT: No, I understand, but --

5 MS. ROBBINS: I'm sorry.

6 THE COURT: But I think your earlier --- the argument
7 you just made is that notwithstanding a termination, we still
8 have a claim under this section.

9 MS. ROBBINS: Yes, and I would like to address that
10 now.

11 THE COURT: Okay.

12 MS. ROBBINS: I think from the unions' perspective,
13 what that language meant was really that there could be -- and
14 I can think of at least two ways that this could happen outside
15 of a termination. Let's say Delphi, instead of terminating the
16 plan, realized that the benefits would not be as great or could
17 not be as great as they currently were, but that by not
18 terminating the plan, there would be another arrangement which
19 would be equitable to all concerned that would not be at the
20 current level but would be at a level that was equitable for
21 everyone, and that that was a circumstance where a reduction in
22 benefits could occur. Now, one of the ways that that could
23 have occurred would be by transferring some of pension benefits
24 to General Motors, and having a reduction that would apply to
25 General Motors and the Delphi people equitably so that -- I'm

1 just throwing out numbers -- instead of a hundred cents on the
2 dollar, everybody would experience the reduced eighty cents on
3 the dollar. But the idea was that everyone who was a
4 participant in the Delphi program would be getting exactly the
5 same benefit -- I mean, years of service, but it would be
6 calculated on the same formulas. Everybody would be similarly
7 disadvantaged. Regardless of what we all knew was going on,
8 which was that there were other parties in play. It certainly
9 did not mean that there could be a termination and people would
10 be treated differently because some people would be transferred
11 or some people would get guarantees and others wouldn't. It
12 was saying, listen, if we find a way out of this that's going
13 mean some reduction and it's equitably shared by everybody in
14 the world that's covered by this plan, that could happen.

15 MS. MEHLSACK: Your Honor, also, the language of the
16 agreement speaks to benefits being similarly reduced for other
17 retirees. It really doesn't say who and how those benefits may
18 be reduced. It contemplates a consequence, regardless of who
19 the actors are and how the reduction comes into play. There's
20 also two things that are being promised in the MOUs. One is a
21 certain level of benefits, including supplemental benefits that
22 are effectively, in the context of a termination would be
23 nonguaranteed benefits, and the second is an equitable level of
24 potential reductions, however those reductions may come about.
25 And it's both those promises that come into play and that we

1 assert are being breached and leave us with a claim. That is,
2 it's not inconsistent with the notion that the plan is going to
3 be terminated to say that if it is terminated and there is a
4 loss of benefits expressly promised in the MOU or a failure to
5 result in an equitable reduction, that there remains in place a
6 claim for those breaches.

7 THE COURT: Well, let -- I understand what both of you
8 have been saying. I want to explore one point, though, in a
9 little more detail, which is is there anything that Delphi did
10 to disproportionately reduce the benefits for your union
11 members in contrast to other participants in the HRP?

12 MS. ROBBINS: They terminated the plan with specific
13 provision for every other group of individuals other than our
14 group such that the benefits levels were not reduced, in
15 effect -- were not reduced equitably, similarly reduced for
16 others as they were for our individuals -- our participants.
17 And that is documented in the PBGC settlement.

18 THE COURT: But let me ask --

19 MS. ROBBINS: The settlement may be appropriate, or
20 maybe has already been approved, but it certainly placed our
21 participants in a different circumstance than the other
22 participants.

23 THE COURT: But let me ask you, what is it that Delphi
24 did to do that as opposed to GM or the PBGC?

25 MS. ROBBINS: It entered that agreement, among other

1 things.

2 MS. MEHLSACK: And I think, Your Honor, this
3 effectively shades off into the fiduciary duty claim, as well.
4 So I don't think it's possible to separate out all of the
5 aspects of the transactions involved. And even though those
6 transactions may have been, from a settler perspective,
7 appropriate business decisions, they nonetheless, from the
8 fiduciary perspective, we believe, breaches. And that goes
9 to --

10 THE COURT: Okay, no, I want to -- I'll get to that,
11 and I agree with you, I think it does transition into that
12 second level of claim, but I want to make sure I've covered the
13 contract issues, first.

14 MS. ROBBINS: The conduct is a combination of agreeing
15 to -- a claim for -- the PBGC's claim for money from Delphi
16 through the plan is the claim for money that could go to pay
17 both guaranteed benefits and nonguaranteed benefits.

18 THE COURT: Right.

19 MS. ROBBINS: The agreement was to give -- the
20 agreement was that that claim would be reduced by fifty percent
21 at the same time as there is an agreement that there will be
22 nonguaranteed be -- there will be transfers made of certain
23 participants' assets and liabilities. There will be
24 nonguaranteed benefits that will be paid to similarly-situated
25 participants, while leaving the participants that the splinter

1 unions represent without those guaranteed benefits. So it's
2 the combination of those acts that go to the breach of the
3 MOUs. I don't think you can view it as any single act. There
4 is not a, in fact, the MOU contemplates plan termination. Now,
5 there are two kinds of plan terminations. If Delphi had
6 actually voluntarily terminated the plan, it could not do that
7 without contemplation -- without dealing with the collective
8 bargaining agreement obligation. But in fact, what happened
9 here was -- admittedly, the PBGC went into the district court
10 and fought an order of termination. And that is contemplated
11 by the MOU.

12 So it's the combination of acts that led to the two
13 consequences: the supplemental benefits, the nonguaranteed
14 benefits not being paid to a group of similarly-situated
15 participants while they are being paid to another group of
16 similarly-situated participants, an agreement to give up on
17 behalf of the plan claims that could have resulted in the group
18 of participants who are not getting their nonguaranteed
19 benefits paid through GM, there being enough money in the plan
20 to pay those nonguaranteed benefits, and now there is not
21 enough money in the plan. So that's the combination of conduct
22 that --

23 THE COURT: Well, I was sort of following you until
24 the last point. I didn't really under -- can I walk through it
25 and let me see if I summarize what you're saying correctly.

1 You're saying that the breach of this second sentence of
2 paragraph 2(b) of the MOU, which is, "These benefits will not
3 be reduced from the levels in effect as of the date immediately
4 preceding the effective date unless they're similarly reduced
5 for other retired HRP participants," you're saying that Delphi
6 breached that provision by entering into the PBGC settlement
7 agreement which provided for or contemplated the transfer of
8 some HRP participants but not your clients, or not your union
9 members, to the GM plans, and as a result of that transfer,
10 those people got more in respect of the nonguaranteed portion.
11 Is that right?

12 And then secondly -- and this is where I didn't follow
13 your argument -- that Delphi's having not funded the plan more
14 breached the agreement.

15 MS. ROBBINS: Your Honor, if I could elaborate on both
16 of those points.

17 THE COURT: Okay.

18 MS. ROBBINS: First of all, on the last point, the
19 PBGC settlement provides in the preamble that it's acknowledged
20 that the PBGC is entitled to a seven billion dollar unsecured
21 claim. But that same provision says that the only general
22 unsecured claim that the PBGC will get from Delphi is a three
23 billion dollar claim, an allowed three billion dollar claim,
24 even though it was entitled to a seven billion dollar claim.

25 THE COURT: Right.

1 MS. ROBBINS: So that is one part of the agreement
2 that Delphi made that basically put it in a position where it
3 knew that individuals were going to have benefits that were
4 reduced dissimilarly.

5 THE COURT: But why would it -- I'm sorry, why would
6 it be dissimilarly. I guess that's --

7 MS. ROBBINS: I think that that goes to two items.
8 One is the provisions for transferring liability from Delphi to
9 General Motors, which occurred in a number of circumstances
10 post the agreement, and basically, created a circumstance where
11 some people would get full benefits. Delphi participants would
12 get full benefits, and others would not. In addition to that,
13 there is the acknowledgement in the PBGC settlement of benefit
14 guarantees, which again provide some Delphi participants will
15 get full benefits, and others will not.

16 THE COURT: Explain the latter point to me. I'm not
17 sure I follow that.

18 MS. ROBBINS: The PBGC settlement provides references
19 to the pension benefit guarantee. At the same time, as Ms.
20 Mehlsack indicated, at the same time that the contribution --
21 or, the general unsecured claim for Delphi participants is
22 being reduced, there is an acknowledgement and a maintenance of
23 the cross-claims of the PBGC and Delphi and GM to support the
24 pension benefit guarantee. So what you have is a circumstance
25 where you're reducing the funds that are available to people

1 who are not transferred to General Motors, and also do not have
2 the pension guarantee. And you're at the same time reducing
3 the funds that are available for the people left behind because
4 you're not getting the seven billion; you're getting the three
5 billion. That's a general unsecured claim. You know, it's not
6 necessarily a hundred cents on the dollar, but you basically,
7 instead of providing as much as a participation as there should
8 have been, you've reduced that.

9 THE COURT: But let me -- but if you're moving most of
10 the people to GM, doesn't that reduce PBGC's claim because GM's
11 picking up that -- that plan's picking up the responsibility?

12 MS. ROBBINS: Your Honor, I have not seen a full
13 accounting of everything that went on, but what everybody had
14 to understand from that entire transaction is that the people
15 left behind in the Delphi hourly plan were not going to be
16 treated similarly to the people who were transferring and the
17 people who were getting the benefit guarantee. So this
18 agreement was reached in the context of basically breaching our
19 provision that the reduction would only happen if everybody's
20 benefit was similarly reduced.

21 THE COURT: But I guess the question I have, here, and
22 it's just a matter of interpreting this provision, it's the
23 reduction of benefits under the Delphi HRP plan, right? It's
24 not a reduction of benefits, generally. So, I mean --

25 MS. ROBBINS: No, it doesn't say that. It says

1 similarly reduced for other retired Delphi HRP participants.
2 It doesn't say, as Ms. Mehlsack indicated, it does not say that
3 the benefits are the benefits coming from the Delphi HRP. It's
4 talking about the --

5 THE COURT: Well, it says -- I'm sorry, it say "these
6 benefits".

7 MS. MEHLSACK: Your Honor, it's correct. It's the
8 benefits -- the level of benefits we're talking about are those
9 that are provided under the plan. But also, the MOU is very
10 specific that Delphi is promising the splinter unions that
11 those benefits that we know the PBGC characterizes under the
12 statute as nonguaranteed benefits will be paid. So that the
13 provision that says benefits shall not be reduced for one group
14 unless they're being reduced for another contemplates the level
15 that's being promised, originally defined by the HRP, but then
16 by the MOU explicitly promised by Delphi that we're going to
17 keep these benefits -- your -- the people that you represent
18 are going to be able to maintain their benefits at
19 nonguaranteed benefit levels. It talks about -- there are
20 several provisions and not just the supplemental benefit that
21 lasts until age sixty-two, but the promise that there will be
22 certain accruals that will continue so that all of those -- it
23 is not -- it is the benefits at the level in the HRP as of a
24 certain date, but the sentence that says, "Benefit shall not be
25 reduced for one group unless reduced for another" is -- however

1 that -- the concept is not necessarily that Delphi is going to
2 say, all right, we're reducing benefits in the HRP, but that
3 whatever conduct occurs, if it results in a reduction for one
4 group and not another, constitutes a breach of that provision.
5 I don't know if that helps, Your Honor. That is our
6 understanding of what that agreement means. In other words, if
7 Delphi doesn't have to say I'm reducing the benefit -- we're
8 reducing the benefits, the result is there is a reduction.

9 MS. ROBBINS: And it does not say the benefits
10 provided by the Delphi HRP, it says the benefits which are
11 listed, as Ms. Mehlsack indicated, by exactly what they were in
12 the Delphi plan will be reduced parallel for other Delphi HRP
13 participants. And this is before the transfers and before the
14 guarantees but it contemplates that everyone's going to be
15 treated the same. We may have to move some to GM, we may have
16 to keep some here, we may have to do this or that, but
17 everyone's going to be similarly reduced if there is a
18 reduction.

19 THE COURT: Okay.

20 MS. MEHLSACK: And, Your Honor, if I may address the
21 question that you asked before about whether or not a transfer
22 of certain participant's assets and liabilities wouldn't reduce
23 the PBGC claim. That is certainly true, but the reductions
24 that the -- the magnitude of the reduction is of the PBGC claim
25 is greater, we believe, than -- we're not in a position to

1 calculate exactly, but just based on the --

2 THE COURT: Well, I don't think that would be for this
3 hearing since it's just a sufficiency hearing.

4 MS. MEHLSACK: Right.

5 THE COURT: But it does strike me that you're -- the
6 people you're -- in your unions are about twenty-five people,
7 right? Did it --

8 MS. ROBBINS: It's a hundred between all three unions.

9 THE COURT: Oh, I'm sorry. All three would be
10 about --

11 MS. ROBBINS: Right.

12 THE COURT: -- but the ones that went to the GM are
13 far beyond that number, right?

14 MS. MEHLSACK: No, Your Honor, to -- you mean the ones
15 that the assets transfers? That went --

16 THE COURT: The people that were picked up by GM?

17 MS. ROBBINS: I don't know that we've ever seen that
18 number, Your Honor.

19 THE COURT: Okay.

20 MS. MEHLSACK: Your Honor, we -- you mean over all the
21 unions?

22 THE COURT: Yes.

23 MS. MEHLSACK: Oh. I don't know what the -- the asset
24 transfers of what is called the 414(1) transfers, I'm sure that
25 the UAW IUE steelworker numbers were greater than -- we had --

1 the operating engineers had five people transferred under those
2 414(1) transfer agreements.

3 But it's not simply the 414(1) transfers. It's the
4 payment of nonguaranteed benefits and that's where -- in other
5 words, GM -- as we understand GM -- what's happening, to the
6 extent that those people who are protected by the payment of
7 their nonguaranteed benefits are -- don't get them from the
8 HRP. GM will pay -- will be providing those benefits whether
9 by -- and I don't believe it, but my understanding is it is not
10 by a transfer to the GM plan, but whether or not that is -- in
11 other words, GM -- there's going to have to be some kind of --

12 THE COURT: GM reaffirmed the backstop.

13 MS. MEHLSACK: That's right. And did it for all
14 the -- all the other unions involved.

15 THE COURT: Okay. Was that it -- that wasn't in the
16 settlement agreement was it?

17 MS. MEHLSACK: It is in -- it is in Section B of the
18 settlement agreement.

19 THE COURT: I thought it didn't cover all of the -- I
20 thought it just covered a couple.

21 MS. MEHLSACK: Well, it contemplates -- as I read part
22 B, the UAW had already received its promise that the
23 nonguaranteed benefits would be picked up and the agreement
24 contemplates the possibility that there will be additional
25 unions who --

1 THE COURT: Which they fought over in the GM case and
2 eventually agreed to.

3 MS. MEHLSACK: That's right, Your Honor.

4 THE COURT: Okay.

5 MS. MEHLSACK: That's right.

6 THE COURT: All right. So, can we turn, then, to the
7 fiduciary duty point?

8 MS. MEHLSACK: That similarly derives from -- it's the
9 same conduct --

10 THE COURT: Well, let me focus, then, on a -- a little
11 more narrowly then. It would seem to me that -- I want to
12 focus on the specific conduct that is alleged to have
13 breached -- in which the plan wearing its fiduciary hat, the
14 debtor breached its fiduciary duties.

15 MS. MEHLSACK: And very -- it's not simple, Your
16 Honor, to pull apart, because I think it is a -- it's the
17 global transaction. It's one giving -- agreeing that there
18 will not be a claim that the PBGC will make against Delphi. In
19 other words, the plan is entitled to certain contributions.

20 The PBGC has the right to demand those contributions
21 and the agreement was the PBGC would give up the plan's claim
22 for three billion dollars worth of contributions. And those
23 are assets, plan assets, that now to the extent that Delphi
24 retains those assets, Delphi is effectively unjustly enriched
25 at the expense of our participants because at the same time,

1 Delphi has entered into an agreement with GM, and as well as
2 its agreement with the PBGC, and that agreement contemplates
3 that even though there will not be enough money to pay
4 nonguaranteed benefits, GM, and there are several complicated
5 intercompany transactions, exchanges of claims, between GM and
6 Delphi and amongst those exchanges are an agreement that GM is
7 going to pick up the cost of the nonguaranteed benefits,
8 however much GM is entitled to claim from Delphi for picking up
9 that portion of the nonguaranteed benefits, there's an agr --
10 there's that aspect of the agreement. So, effectively, Delphi
11 is saying, well, we're going to get to keep a certain
12 proportion of assets that would otherwise be available through
13 the PBGC to pay nonguaranteed benefits even though we know that
14 similarly situated participants are going to get their
15 nonguaranteed benefits while this one very small group of
16 people are not going to receive their nonguaranteed benefits.

17 THE COURT: I guess that --

18 MS. MEHLSACK: And --

19 THE COURT: -- I'm sorry; I didn't mean to interrupt
20 you. Go ahead.

21 MS. MEHLSACK: -- it's the differential treatment
22 combined with the effectively saying we're going to enter into
23 this contract in which we agree that we all agree there will be
24 less money available through this plan to pay nonguaranteed
25 benefits to similarly situated participants even though we know

1 that one group of those similarly -- the lion's share, ninety,
2 whatever the percentage, got to be more than ninety-nine
3 percent of those similarly situated participants are going to
4 get their nonguaranteed benefits.

5 So, we, Delphi, are getting to keep some money that
6 would otherwise be available to pay that very small group of
7 nonguaranteed benefits -- of participants whose nonguaranteed
8 benefits are not being guaranteed as part of this -- these
9 other arrangements.

10 THE COURT: But I -- I guess it's the latter part that
11 I don't understand as a breach of fiduciary duty which is how
12 is it a breach of fiduciary duty to have -- to, in essence,
13 transfer liability out of the plan and onto GM?

14 MS. ROBBINS: Your Honor, I don't think that it's the
15 transfer of liability from the plan to GM. It's that when you
16 transfer the liability, you have not made sure that the
17 participants on both sides of the transaction are going to be
18 treated equitably. And, you know, our brief references several
19 cases where the way in which an employer terminated the plan in
20 a way that not all participants were treated equitably
21 constituted a breach of fiduciary duty.

22 If you're involved in transferring liabilities and
23 you're starting out with all of the participants, you're
24 responsible for making sure that they're all going to be
25 treated equitably at the other end of the transaction. And

1 here instead, there is very obvious evidence that that's not
2 the case. Some participants are being transferred with full
3 benefits. Some people are going to be guaranteed a comp to get
4 those additional benefits. And at the same time, you're
5 reaching an agreement that you're going to keep four billion
6 out of seven billion. You're only -- even though you know that
7 the PBGC is entitled to seven billion, you've been managed to
8 reduce that amount to four billion -- or to three billion
9 reducing it by four billion. So, you've created the situation
10 where this -- this group that is not transferred and you --
11 will not have the guarantee it's going to be in a very
12 different circumstance from everybody else and you did the
13 transfer knowing that.

14 THE COURT: But I don't see where that group is any
15 worse off than if there had not been the transfer. I mean
16 it -- they may be envious that GM has picked up the liability
17 to the group that was transferred, but I don't see how the
18 debtor has deprived them of something.

19 MS. ROBBINS: Well, Your Honor, I -- if you are
20 terminating a plan and you are making decisions not to take
21 resources that would be avail -- or you're transferring
22 resources that should have been available to the HRP, the seven
23 billion in general unsecured claims and you're reducing it to
24 three.

25 THE COURT: No, that's -- that part I understand the

1 argument. I think the debtor probably has responses to it.
2 It's the second part about the so-called disparate treatment
3 that I don't -- I don't see how that fits into any sort of
4 fiduciary duty argument.

5 MS. ROBBINS: Well, Your Honor, I think it's part and
6 parcel of the same thing. If you're protecting some people by
7 transfer, don't you protect other people in whatever way
8 possible? Don't you make equitable protections? One of the
9 cases that we cited, I think it's a Seventh Circuit case, Solis
10 (ph.), in that last paragraph, you know, talks about
11 participants having alternative elections as to whether they
12 would take real property or cash for their pension.

13 THE COURT: But that was -- but that was a guy who
14 stole the money. I mean he took the money.

15 MS. ROBBINS: And here four billion went into the
16 general coffers instead of into the pension plan.

17 THE COURT: But he was a -- he was a participant in
18 the plan. I mean I just -- it seems to me that by moving -- by
19 permitting the move of the UAW and potentially others, which
20 eventually happened, the steelworkers and the IUE, I guess, you
21 actually reduce the claims against the debtors' plan because
22 they're being satisfied out of the GM plan --

23 MS. MEHLSACK: Your Honor, if I may. It's my
24 understanding that it's not -- what would happen -- is going to
25 happen first is the PBGC and -- makes a determination as to

1 what people's benefit levels are going to be. And to the
2 extent that you are a participant who is protected by the GM
3 agreement, if your nonguaranteed benefits are not being paid by
4 the PBGC then you go to GM. Because it's my understanding that
5 what's been left open between GM and the PBGC is, in fact, any
6 claims that GM may have that the PBGC has incorrectly
7 calculated what's available for non -- or not available for
8 nonguaranteed benefits. So, that my understanding is that what
9 GM is doing, except the 414(l) transfers are different; those
10 were transfers of both assets and liabilities. So, those
11 should have been, I believe, a wash. But when it comes to the
12 guarantee of nonguaranteed benefits, my understanding is GM
13 only steps in to the extent that the plan assets that are
14 available for the PBGC to allocate, are not -- will not cover
15 nonguaranteed benefits.

16 THE COURT: Okay.

17 MS. MEHLSACK: So that there is no benefit to the
18 plan.

19 MS. ROBBINS: The pension benefit guarantee those
20 individuals are actually being subsidized by General Motors
21 while they stay in the Delphi plan.

22 THE COURT: All right. But I guess -- I still don't
23 see how -- I don't see how the plan is harmed by it. I mean
24 it's basically --

25 MS. MEHLSACK: What would be -- and, Your Honor --

1 THE COURT: -- these people are getting something else
2 from another source. I mean if, in fact, the fiduciaries of
3 the plan reduce the amount that they were entitled to it would
4 seem to be that they would be the ones that have the beef.

5 MS. MEHLSACK: -- Your Honor, can --

6 THE COURT: We're trying because everyone's getting
7 their pro rata share of the deficiency and then GM is picking
8 up the difference.

9 MS. MEHLSACK: But the agree --

10 MS. ROBBINS: But you're --

11 MS. MEHLSACK: Go on.

12 MS. ROBBINS: But, Your Honor, in this situation,
13 there is an agreement that trades off and reduces what's
14 provided to the Delphi HRP and at the same time recognizes
15 these other benefits and the claims that arise from them. And
16 so what you have is you have a transaction that is
17 disadvantaging one and advantaging others who are all Delphi
18 participants.

19 THE COURT: Okay.

20 MS. ROBBINS: And if I may, we're all similarly
21 situated Delphi participants because there are other groups of
22 Delphi participants who are not similarly situated.

23 MS. MEHLSACK: Your Honor, is --

24 THE COURT: But how is -- aren't I right that the UAW
25 had a benefit guarantee that your union's collective bargaining

1 agreements don't provide for? So, I mean that -- isn't that
2 ultimately the basis for GM's willingness to pick this up?

3 MS. MEHLSACK: Well, Your Honor, that is -- there's
4 no -- we can't say the fact that there is no benefit guarantee.
5 But it's more -- I really think that --

6 MS. ROBBINS: No, wait --

7 MS. MEHLSACK: Marianne, if I may. It's more
8 complicated, Your Honor, because the entity that's picking up
9 these obligations is New General Motors not Old General Motors.
10 So, the question of whether or not it is --

11 THE COURT: But that wasn't the case -- when the
12 debtor entered into this agreement, that wasn't the case,
13 right? 'Cause I don't think at that point GM had gone into
14 bankruptcy.

15 MS. MEHLSACK: Oh, yeah, no, this agreement, Your
16 Honor, the overall PBGC settlement agreement, though, is an
17 agreement that encompasses both New GM and Old GM. So, it
18 contemplates that there may be obligations for nonguaranteed
19 benefits. It's not simply the UAW obligation or the
20 obligation -- an obligation to the UAW.

21 THE COURT: But that's just something in the future.
22 I mean I -- I guess --

23 MS. ROBBINS: Your Honor.

24 THE COURT: -- that always struck me as nice language
25 but it didn't really bind them to anything.

1 MS. ROBBINS: Your Honor, I think that that same
2 sentence that talks about reduction certainly from our point of
3 view meant that all Delphi participants were going to be
4 treated the same regardless of whether there was a benefit
5 guarantee or not.

6 THE COURT: Okay. Now, we've --

7 MS. ROBBINS: Everyone is going to get the same
8 benefit --

9 THE COURT: All right.

10 MS. ROBBINS: -- wherever they came from.

11 THE COURT: We covered that. We've covered that one,
12 though, right?

13 MS. ROBBINS: Yeah.

14 THE COURT: Okay. I guess the -- and I -- Mr. Lyons
15 has been waiting here and probably wanting to talk, but the
16 last question I had on this point is if you can find, for the
17 moment, the fiduciary duty issue to simply the fact the debtor
18 agreed to a compromise of the PBGC's claim, and now we're just
19 talking about fiduciary duty, we're not talking about the
20 contract issues, the debtor agreed to a compromise of the PBGC
21 claim, what is your response to the argument that the PBGC in
22 looking out for pension beneficiaries and being given the right
23 to make the claim, has every incentive to make the claim be
24 allowed as high as it should be, and that the decision to
25 compromise the claim shouldn't be second-guessed. That they're

1 the ones with the standing to do this.

2 MS. MEHLSACK: Your Honor, we think that there are a
3 number of issues that mean that they are not -- they are not
4 the exclusive -- they may be the exclusive holder of a claim
5 for contribution on behalf of a plan, but that's not the claims
6 that we're making. And so, there are two things. One is that
7 the preemption argument expressly recognizes, and we believe
8 that even that the Sixth Circuit would recognize, a breach of
9 fiduciary duty claims are not preempted under Title IV. And,
10 in fact, the settlement agreement expressly says that so that
11 to the extent that our claims are for breach of fiduciary duty,
12 the PBGC's role as the trustee of the plan does not subsume
13 those claims.

14 THE COURT: You know, I guess I asked my question a
15 little -- I didn't ask it right. I understand that the
16 preemption argument applies to the contract claims. But it
17 seems to me an odd fiduciary duty claim to assert that the
18 claim -- the breach of fiduciary duty claim is based upon the
19 debtors' settlement, not the -- the debtors' settlement of the
20 PBGC's claim when the PBGC -- I mean you're basically saying
21 that it's a totally one-side -- you're basically assuming it
22 has to be a one-sided negotiation. The debtor should agree to
23 whatever PBGC says. If it doesn't, it's breaching its
24 fiduciary duties.

25 MS. MEHLSACK: Your Honor, that's where I think you

1 can't -- I'm afraid we can't separate the claim basis -- the
2 claim issue from the inequitable treatment issue.

3 THE COURT: Well, no, I'm going to ask you to do that
4 though, because I'm really just focusing on the claim at this
5 point. And I just -- it just seems odd to me. I mean this
6 argument would suggest that the PBGC could assert, you know --
7 and the PBGC has been known to do this. To take the wildest
8 discount rate they could think of and assert a ten billion
9 dollar claim. And a debtor that's a sponsor of a plan has no
10 ability to object to such a claim without making itself
11 susceptible to breach of fiduciary duty? It just doesn't -- it
12 seems odd to me.

13 MS. ROBBINS: Your Honor, in this case though, both
14 parties stipulated that the PBGC was entitled to the seven
15 billion dollar figure. So, it's not like the debtor was taking
16 the position that the seven billion dollar figure was
17 unjustified and the four billion dollar figure was all that was
18 justified and they compromised because there was a difference
19 of opinion. They both agreed that seven billion dollars was
20 owed but only three billion would be paid. Not paid in full
21 but paid as an allowed general unsecured claim. And there are
22 so many things going on including claims relating to the cross-
23 claims going to the benefit guarantee that there may be
24 tradeoffs involved. But the fact is that what we know is that
25 our people were disadvantaged to the amount of our share of the

1 four billion dollars. And the same agreement where everybody
2 was reserving their rights to cross-claim about the pension
3 benefit guarantees.

4 THE COURT: Okay. So, let me ask you, Mr. Lyons, what
5 is the response to the argument that the unions are making
6 that -- and I'm not -- you don't need to jump in, Ms. Robbins
7 or Ms. Mehlsack because I know you're making other arguments
8 too, but I'm just limiting it to this argument, that the unions
9 should be able to pursue a breach of fiduciary duty claim based
10 on the agreement to compromise an allowable seven billion
11 dollar claim for three billion dollars?

12 MR. LYONS: Your Honor, the PBGC, when they terminated
13 the plan they were the holder of the claim. They exercised all
14 judgments on how to collect it from whatever asset pools and
15 how to compromise it.

16 You know, basically, they're trying to hold us to a
17 breach of fiduciary duty over the claimants' decision how to
18 settle a claim. There's no possible way that we could have a
19 fiduciary duty to make sure some other claimant settled at a
20 high number. That makes absolutely no sense. We didn't
21 control the claim at that point. That was a claim held by an
22 independent government agency that negotiate at arm's length
23 and which was approved by Your Honor at a fairness hearing. It
24 just makes no sense at all that somehow we could be responsible
25 for some kind of breach of fiduciary duty for how PBGC decided

1 to settle the claim.

2 THE COURT: And this isn't the preemption argument
3 because it is breach of fiduciary duty. You're just saying
4 that the claimant is charged with pursuing its rights and if
5 they don't pursue it the plan trustees don't have an obligation
6 to -- on behalf of the participants to get them to pursue it?

7 MR. LYONS: No. Because I mean at that point, the
8 PBGC is the holder of the claim. They are the fiduciary. They
9 are the ones who are going out to try to maximize returns.

10 THE COURT: Because they terminated the plan?

11 MR. LYONS: Right. Nobody -- there was no trust
12 fiduciary relationship vis-a-vis that claim. That was taking
13 over by the PBGC when they terminated the plan. It's -- you
14 know, when they terminated the plan, the PBGC took over the
15 plan and took over all claims.

16 THE COURT: So, you're basically saying vis-a-vis the
17 claim at that point there was no fiduciary on the plan side?
18 That PBGC was the fiduciary?

19 MR. LYONS: Once the plan was -- once the plan was
20 terminated by the PBGC, the PBGC, by operation of the ERISA
21 statutes, was and charged with pursuing claims and then making
22 distributions in accordance with PBGC distribution scheme.

23 THE COURT: Ms. Robbins or Ms. Mehlsack, what's the
24 response to that?

25 MS. MEHLSACK: Your Honor, when the agreement was made

1 the plan was not yet terminated.

2 MS. ROBBINS: And I guess I would add, Your Honor, we
3 are pursuing our claim for loss of pension benefits and the
4 PBGC is not opposing our claim. And, you know, we're not
5 asserting the PBGC's claim, we're supporting our own claim
6 which is not being opposed --

7 MR. LYONS: Your Honor --

8 MS. ROBBINS: -- by the PBGC.

9 MR. LYONS: -- if I may interject there

10 THE COURT: Well, that's a whole separate -- that's
11 the standing issue and that's a separate issue I think.

12 MR. LYONS: Yeah. To say that PBGC isn't in
13 opposition to what the splinter unions are trying to do is flat
14 wrong, Your Honor. I think the PBGC, they're not here before
15 Your Honor, but clearly the PBGC has taken the position in
16 other cases that they are the owner of these claims.

17 MS. ROBBINS: Well, in this case there are --

18 THE COURT: Mr. Lyon's, what's your response to the
19 point that at the time the PBGC settlement was entered into,
20 the plan hasn't been terminated yet and so, therefore, at that
21 point debtors were still --

22 MR. LYONS: Well, if you remember the settlement
23 agreement, Your Honor --

24 THE COURT: -- a sponsor.

25 MR. LYONS: -- it didn't lock the PBGC into doing

1 anything. If they chose to terminate it then that would be --
2 that's an independent credit action on the part of the PBGC as
3 to whether or not they wanted to terminate the plan. If they
4 wanted to assess that in advance, I mean again that ultimately
5 I don't think that in any way would result in a breach of
6 fiduciary duty on our part.

7 And another point, Your Honor, the disposition of
8 spinoff or what have you is not a fiduciary act and we've laid
9 this out in our papers; it's a settler action. It's not a
10 fiduciary action.

11 THE COURT: No, I'm just talking about the claim now.
12 I'm just talking about that point; settling the claim.

13 MR. LYONS: Well, you know, again, Your Honor, I don't
14 think it is a -- in essence a contingent settlement that will
15 happen once the termination occurs. I don't think it involves
16 or could be alleged to be some type of breach of fiduciary duty
17 on the part of Delphi, Your Honor.

18 THE COURT: Okay. Am I right, and this is for all
19 three of you, that the only asset -- besides the argument about
20 the claim being fixed at three billion instead of seven, am I
21 right that the only transfer of assets is through the 414
22 transfers? That the other people that get the benefit of the
23 GM backstop that's all they get? The asset doesn't go over.
24 They're not other assets from the plan going over in respect of
25 them?

1 MR. LYONS: Yeah. I don't think, Your Honor, there's
2 any issue and they can confirm whether the asset transfers were
3 somehow inappropriate. That I don't think is before -- I don't
4 think that's ever been really called into question.

5 MS. ROBBINS: Your Honor, the only thing that I would
6 note is that there is reference to reserving cross-claims for
7 the pension benefit guarantee and there's no specificity as to
8 what those are or would be.

9 THE COURT: Cross-claims --

10 MS. ROBBINS: But other than that, I think Your Honor
11 is accurate.

12 THE COURT: You mean claims by GM against the --

13 MS. ROBBINS: It doesn't -- all it says is the PBGC,
14 GM, Old GM, Delphi, I believe -- I believe they're all in
15 there; I'd have to go back and look. But that there are a lot
16 of cross-claims that are not being resolved.

17 MS. MEHLSACK: And, Your Honor, I think that goes to
18 and it does involve plan assets whether or not the PBGC is
19 correctly calculating from GM's point of view how much is
20 available to pay nonguaranteed benefits.

21 It's my understanding and I'm not really clear on it
22 but I believe that GM preserves the right to go to the PBGC and
23 say your -- whatever interest factor you're using is incorrect.
24 You should be paying more money out of the plan so that we, GM,
25 have to pay less money.

1 THE COURT: All right. But as far as the plan itself,
2 the debtors -- that the debtor wearing a plan fiduciary hat, it
3 seems to me the only asset transfer that's being alleged to
4 give rise to a breach of fiduciary duty claim here, that they
5 have caused is this claim allowance. Fixing the claim at three
6 billion, right? I don't see -- I mean the 414 seemed to be
7 neutral and fine and I don't see any allegations that somehow
8 other assets have been transferred out of the plan to GM or to
9 PBGC separately.

10 MS. MEHLSACK: To the --

11 MS. ROBBINS: Other than what was left open on that
12 issue.

13 THE COURT: I'm sorry?

14 MS. ROBBINS: Just the thing I said before, Your
15 Honor, that it's not clear what claims and counterclaims there
16 might be concerning the pension benefit guaranty as
17 Ms. Mehlsack described.

18 MS. MEHLSACK: Also, Your Honor, and I think it's --
19 there is -- part of the agreement is that New GM -- PBGC has a
20 claim against New GM and that in effect, I believe, is all part
21 and parcel of the overall agreement in which the PBGC and
22 Delphi have agreed to reduce the assets available to the plan
23 from Delphi in exchange for the PBGC's recognition that there's
24 going to be, in effect, the equivalent of a follow-up plan
25 through nonguaranteed benefits. The PBGC is getting a claim

1 against New GM so that what you again have is an exchange of
2 assets -- claims for assets that disadvantage a small group of
3 participants.

4 It would have been just as easy --

5 THE COURT: Okay.

6 MS. MEHLSACK: I'm sorry, Your Honor. I won't -- and
7 I don't see -- there are other assets involved.

8 THE COURT: All right. I just don't see it I'm
9 afraid. All right. I'm done with my questions but I'll give
10 you all a chance if you want to supplement what you've already
11 put in the papers which are quite helpful to -- which have been
12 quite helpful to me.

13 MS. MEHLSACK: Your Honor, there is actually one other
14 argument that we -- we did not address in our papers because
15 they had, in fact, not been addressed by the debtor and that is
16 this question of what's equitable relief versus what's legal
17 relief for 502(a)(3) claim. I don't know if Your Honor
18 wants --

19 THE COURT: No, no, you should have a chance to
20 respond to that. If you -- what do you have to say on that
21 point?

22 MS. MEHLSACK: That, Your Honor, what the Second
23 circuit and, I believe, the Supreme Court has recognized that
24 has said is just because something is monetary relief, doesn't
25 mean that it's not equitable. And there are forms of monetary

1 restitution. The question is is the restitution equitable or
2 is it legal in nature? And we believe that in this case,
3 because what we're talking about is going back to the reduction
4 of the seven billion to the three billion, that Delphi is, in
5 effect, getting to keep unjustly assets when at the same time
6 those asset -- knowing that a group of similarly situated
7 participants are not getting their nonguaranteed benefits, that
8 that is a form of unjust enrichments that would permit us to
9 seek restitution in the form of equitable relief and not come
10 afoul of the Supreme Court's holding that only equitable relief
11 is available under 502(a)(3).

12 THE COURT: Okay. Mr. Lyons, do you have anything to
13 add?

14 MR. LYONS: Your Honor, I think you've looked at this
15 and you've ruled on pretty squarely the issue of whether it
16 violates the MOU. You know, Your Honor, I think if you look at
17 what the splinter unions are arguing, they are trying to assert
18 a claim against the debtor for the acts of independent parties.
19 The PBGC terminated the plan. The debtors didn't reduce the
20 benefits. They were reduced by operation of law by reason of
21 the termination and the fact that other participants may have
22 been topped off by GM that was a consideration that GM put in.

23 I am sure the debtors would have loved have had GM be
24 able to top off on the splinter unions as well. But, Your
25 Honor, we do not control the actions of GM nor can we control

1 the actions of the PBGC.

2 You know, quickly on this restitution point, I'm not
3 sure exactly what relief they are seeking here, Your Honor. I
4 mean are they seeking to go out to all the other UAW employees
5 and all the other union members and are they the ones being
6 unjustly enriched? Because I don't see how the debtors are in
7 any way unjustly enriched. The fact of the matter that GM may
8 have topped off the others, doesn't translate into unjust
9 enrichment on DPH's perspective.

10 And, Your Honor, unless you have any further
11 questions, I think your ruling was pretty clear. And, you
12 know, again, all the transactions now that are being challenged
13 as breaches of fiduciary duty were approved by Your Honor on
14 notice and hearing and the fairness was determined.

15 THE COURT: You mean as part of the approval of the
16 settlement?

17 MR. LYONS: Part of the approval of settlement, Your
18 Honor, the modification -- the plan modification order. All
19 those were reviewed by Your Honor and the record was very
20 carefully made on those.

21 MS. ROBBINS: And in reply to that point, we think
22 that the Court was very clear that the issue of claim would be
23 addressed separately.

24 THE COURT: I'm sorry, the issue of -

25 MS. ROBBINS: Claim would be addressed separately.

1 That it was not adjudicated at that hearing on the plan.

2 MR. LYONS: You know, one other point, Your Honor,
3 that hasn't really been discussed, is just the United
4 Engineering decision in the Sixth Circuit. I think that
5 decision is clear. I won't go into it. I think Your Honor is
6 very familiar with it. And there is no contrary authority. I
7 know it's in the Sixth Circuit, but there's no contrary
8 authority anyway.

9 THE COURT: But you don't -- you don't disagree with
10 the unions that the unique -- well the preemption of the claim
11 issue doesn't apply to breach of fiduciary duty claims?

12 MR. LYONS: Your Honor, I recognize that.

13 THE COURT: Although you do take the view that the
14 union does not have standing to assert the claim on behalf of
15 its members?

16 MR. LYONS: Yes.

17 THE COURT: The breach of fiduciary duty claim?

18 MR. LYONS: And also the other reasons in our papers
19 why there is no fiduciary duty claim here as well.

20 THE COURT: Right. Okay.

21 MR. LYONS: Thank you.

22 THE COURT: All right. Anything else?

23 MS. ROBBINS: Your Honor, I think it's in our papers
24 that we do not think that United Engineering applies to a
25 circumstance such as this where it's clear that the termination

1 did not contemplate a provision of nonguaranteed benefits and
2 instead was looking to private causes of action or private
3 agreements for those whether they be guarantees or in our case
4 the MOUs. We don't think that -- we think that the prior case
5 law is far more in point in terms of the structure of this
6 termination was at the PBGC's role.

7 THE COURT: Okay. All right. I have before me the
8 objection by DPH Holdings Corporation which is the successor
9 through the Chapter 11 plan for Delphi Corporation and its
10 affiliated debtors and debtors in possession with regard to
11 claims asserted against those entities. It is objected to
12 proofs of claim filed by the IAM, IBEW and IUOE, all unions
13 representing former workers for the debtors who were covered by
14 the Delphi HRP or pension plan. I'll sometimes refer to these
15 unions as the splinter unions. That's just a colloquial term
16 to distinguish them from the UAW, the United Steelworkers, and
17 the IUE who in the aggregate represent far more of the debtors'
18 employees.

19 The objection originally addressed several aspects of
20 the splinter unions' claims based on the initial hearing on the
21 claim objection and the unions' response. I asked the parties
22 for further briefing. The first issue that I asked to be
23 covered has now been completely clarified. It is now clear and
24 the unions acknowledge that the only claims that they are
25 proceeding on at this point and that they have otherwise agreed

1 to the objection over are claims that they have asserted for
2 the reduction in their members recovery of pension benefits
3 under the HRP or the so-called nonguaranteed claim portion of
4 their pension benefits. By the latter phrase, I mean the
5 following.

6 The Delphi HRP was terminated and taken over by the
7 PBGC. Under ERISA, the PBGC is responsible for paying amounts
8 to the pension beneficiaries. The three unions seek to have
9 allowed their claim against Delphi for the amounts owed in
10 respect to the terminated plan to their members that exceed the
11 amounts that will be paid by the PBGC. The unions assert two
12 separate grounds, or alternative grounds, for their claims.

13 First, they contend that the debtors' termination of
14 the pension plans and the subsequent creation of the reduction
15 claims or the nonguaranteed claims violates their respective
16 collective bargaining agreements and therefore gives rise to a
17 breach claim.

18 Secondly, they assert, or alternatively they assert
19 that the agreement by the debtor with the PBGC and GM in
20 respect of the treatment of the Delphi HRP, the PBGC's claim
21 under ERISA against the debtor in respect of the plan for
22 termination liability and the debtors' facilitation of the
23 agreement by GM to backstop any unpaid plan benefits for
24 certain beneficiaries of the plan, namely the UAW, and the
25 recognition of the possibility of GM doing it for other

1 beneficiaries, namely the beneficiaries represented by the
2 United Steelworkers and the IUE, constitute a breach of
3 fiduciary duty by the debtor wearing its hat as a fiduciary
4 under ERISA in respect of being a -- a plan fiduciary.

5 The debtor has raised numerous grounds for objecting
6 to these two claims. The first ground, and I will focus now on
7 the contract claim, is that under ERISA as amended in post-
8 1986, the PBGC has been given sole control over the liability
9 of an employer, such as the debtor, in respect of a pension
10 plan, such as the Delphi HRP, and that such liability is owed
11 uniquely to the PBGC. And, in particular, it is not owed under
12 the Section 301 of the LMRA or assertable by a union
13 notwithstanding the existence of collective bargaining
14 agreement that requires the payment of such benefits.

15 The case law on this issue, I believe, is clear and
16 convincing that the debtors' position is correct. The leading
17 case is United Steelworkers of America v. United Engineering,
18 Inc., 52 F.3d 1386 (6th Cir. 1995) which discusses the stated
19 law prior to the amendments to ERISA in which the courts,
20 including the Sixth Circuit as well as the Second Circuit, had
21 filled in what they perceive to be a gap in ERISA that would
22 enable other parties, including unions, on behalf of their --
23 well, including unions, to assert the underfunding claim
24 against the employer or plan sponsor. As discussed in the
25 United Engineering case, it appears clear that congress aware

1 of such case law amended ERISA in '86, in 1986, to make it
2 clear that employers are liable to the PBGC for the total
3 amount of unfunded benefit liabilities.

4 So, based on the United Steelworkers case and cases it
5 cited, including In re Adams Hard Facing Company, 129 B.R. 662
6 (Bankr. W.D.) -- I'm sorry -- (W.D. Okla.), not bankruptcy,
7 (W.D. Okla. 1991), and International Association of Machinists
8 and Aerospace Workers v. Rome Cable Corporation, 810 F. Supp.
9 402 (N.D.N.Y 1993) as well as the subsequent case of In re
10 Lineal Group, L-I-N-E-A-L, 226 B.R. 608, (Bankr. M.D. Tenn.
11 1998), I believe that under ERISA the claim that is the basis
12 for the unions' contract claim is preempted by ERISA.

13 On the preemption argument, or in response to the
14 preemption argument, the unions point to one case and to a
15 theory, and I've considered both, as far as the case is
16 concerned the unions point to an unreported decision of the
17 Sixth Circuit, Local No. 1654 International Brotherhood of
18 Electrical Workers v. LG Phillips Display Components Company,
19 137 Fed. Appendix 776 (6th Cir. June 7, 2005) in which the
20 Sixth Circuit recognized that while state law claims for the
21 recovery of employee benefits are always preempted by ERISA,
22 claims involving rights created by collective bargaining
23 agreement are governed by the LMRA and at least in respect of
24 the facts at hand who are not superseded by ERISA. The facts
25 at hand in that case were based upon not a termination of the

1 pension plan and its takeover claim by -- and the claim
2 asserted after its takeover by the PBGC for the underfunding or
3 deficiency, but rather for a fraud claim in connection with the
4 negotiations involving the termination of the plant and the
5 agreement of the union to receive their retirement benefits in
6 a lump sum. There was no indication that the retirement
7 benefits would not be paid in full, only with regard to the
8 factors used in computing the lump sum. The Sixth Circuit in
9 that unpublished decision stated and recognized the United
10 Steelworkers case as stated. However, United Steelworkers was
11 decided on the narrow ground that ERISA preempted claims for
12 nonguaranteed pension benefits against plan sponsors because
13 ERISA had been amended to provide that plan sponsors were not
14 liable for nonguaranteed benefits.

15 The unions would interpret that sentence to state
16 effectively that as long as there is a separate basis for a
17 claim for nonguaranteed basis in this case under the collective
18 bargaining agreement, they would not be preempted by ERISA. I
19 do not view that to be the case. I believe that the United
20 Steelworkers case, in fact, involve such a situation and
21 nevertheless the Sixth Circuit, I think, correctly said that
22 the claim under Section 301 of the LMRA was preempted as is, I
23 believe, also the case with respect of the logic of that
24 decision applying to provide that the debtor literally is not
25 liable for such amount. And so, therefore, when one looks at

1 the terms of the collective bargaining agreements here, which
2 are set forth in the three MOUs entered into by the respective
3 unions, splinter unions, and Delphi Corporation, paragraph 2(b)
4 of the MOUs states that "Delphi will cause the frozen Delphi
5 HRP to pay benefits in accordance with the terms of the Delphi
6 HRP and applicable law."

7 Applicable law here as interpreted by the Sixth
8 Circuit based on an accurate description of ERISA would fix the
9 liability as fixed with the PBGC and that that would be the
10 claim.

11 The provision goes onto say "These benefits will not
12 be reduced from the levels in effect as of the date immediately
13 preceding the effective date of the MOU unless they are
14 similarly reduced for other retired Delphi HRP participants.
15 The IUOE" and this is also as agreed by the other two unions,
16 "agrees that Delphi reserves its right to seek termination of
17 the Delphi HRP consistent with applicable law."

18 Delphi contends that the reservation of rights
19 recognizes Delphi's right to terminate and to have the claim be
20 limited to the claim determined vis-a-vis it and the PBGC with
21 no additional claim to be asserted.

22 The unions contend that last sentence recognizes a
23 right to terminate but not a right to eliminate the claim. I
24 have already dealt with this issue in connection with the
25 unions' objections to the PBGC settlement and the confirmation

1 of the modified plan which contemplated the foregoing. But in
2 this case, did not address, I believe, sufficiently for res
3 judicata or collateral estoppel purposes any resulting claim
4 that would occur. However, I believe that the reduction of the
5 claim as a result of the termination here is consistent with
6 Delphi's obligations under the MOU which provides that -- which
7 first recognizes the right to terminate and the -- therefore,
8 the implicit role to be played by the PBGC in fixing the claim.

9 And secondly, provides that the benefits prior to
10 termination can be reduced if they are similarly reduced for
11 other retired Delphi HRP participants. I believe the record is
12 clear here that with regard to the benefits under the Delphi
13 HRP those benefits were reduced equally across the board with
14 regard to the participants and therefore the savings provision
15 in the second sentence of paragraph 2(b) applies here.

16 Again, that sentence reads, "These benefits," the
17 these referring to the benefits under the terms of the Delphi
18 HRP, "will not be reduced from the levels of effect as of the
19 date immediately preceding the effective date unless they" the
20 they clearly refers to these benefits "are similarly reduced
21 for other retired Delphi HRP participants."

22 The record is clear here that as far as the benefits
23 paid out under the Delphi HRP, upon termination the benefits
24 paid by the Delphi HRP were paid pro rata across the board to
25 the participants and the HRP.

1 The unions argue that as a result of the PBGC
2 settlement, GM agreed to backstop those amounts that would not
3 be paid out across the board by the Delphi HRP but those are GM
4 benefits and not Delphi HRP benefits. So it appears clear to
5 me to be the case that under the terms of the applicable MOUs
6 there has not been a breach of this agreement.

7 The second basis for the claims, as I said, is that
8 not as the employer or plan sponsor but as a plan fiduciary the
9 debtor is liable for breach of fiduciary duty to each of the
10 three unions. Before discussing the nature of the fiduciary
11 duty that the debtor would have to the beneficiaries of the
12 plan and the alleged breach of that duty, I should first deal
13 with the issue of the union's standing to pursue such a claim.

14 The law in this district and in the Second Circuit is
15 clear that claims for breach of fiduciary duty, under ERISA,
16 are limited to the specific types of persons or entities listed
17 in Section 502 of ERISA. It is clear here that the union is
18 not pursuing the breach of fiduciary duty claims as a
19 beneficiary of the Delphi HRP or in any other capacity
20 recognized specifically by section 502 of ERISA. Consequently
21 the debtors -- the debtor has argued that the unions do not
22 have standing to bring this claim, which is one effectively for
23 money damages given that it is a proof of claim and therefore
24 seeks relief for money either -- well, on the basis of Section
25 1015 of the Bankruptcy Code.

1 I agree with the debtor's argument that the unions do
2 not have standing in this situation. Again, this is not
3 premised upon pre-emption because the debtors and I agree with
4 the unions that the fiduciary duty claim is not the same thing
5 as the underfunding or deficiency claim that only the PBGC has
6 against a sponsor but is rather based on a separate provision
7 of ERISA.

8 However, as laid out in the case law, that claim is
9 limited in ERISA to parties that would not include here the
10 union, see Local 100 Transport Workers Union v. Rosen, 2007, WL
11 2042511 (S.D.N.Y. July 13, 2007), Toussaint v. J.J. Wiser &
12 Company, 2005 WL 356834 (S.D.N.Y. February 13, 2005); District
13 65 UAW v Harper & Row Publishers Inc., 576 F Supp 1468
14 (S.D.N.Y. 1983). See also McCabe v. Trombley, 867 F Supp 120
15 (N.D.N.Y. 1994).

16 In response, the union sites, or the unions site, the
17 American Medical Association v. United Healthcare Corporation,
18 2002 U.S.D. LEXIS 20309 (S.D.N.Y. October 23, 2002) as well as
19 the American Medical Association v. United Healthcare
20 Corporation, 2003 U.S.D. LEXIS 1398 (January 30, 2003) in which
21 Judge McKenna gave standing to, in the first case, the Medical
22 Association plaintiff and in the latter case to, among others,
23 unions in a fiduciary duty breach litigation under ERISA.
24 However, he did so after having carefully analyzed the factors
25 for associational standing in International Union United Auto

1 Workers v. Brock 477 U.S. 274281 (1988). In doing so, he made
2 it clear in both opinions that he granted standing only insofar
3 as the relief sought by the associations or the unions related
4 to claims for injunctive declaratory relief as opposed to a
5 damages claim. I also note that the second order, which
6 applied to the unions, was, in addition to being limited to
7 that basis, was without opposition by any party.

8 The unions also rely on Southern Illinois Carpenters'
9 Welfare Fund v. Carpenters' Welfare Fund of Illinois, 326 F. 3d
10 919, (Seventh Circuit, 2003). However, in addition to this
11 case I believe not being on point with the present facts, it's
12 also contrary to the case law from the second circuit that I've
13 previously cited to the extent it is on point, which I, again,
14 don't believe to be the case.

15 So before turning to the merits of the fiduciary duty
16 claim, I conclude that the claim should be disallowed based on
17 the union's lack of standing to pursue this claim for money,
18 whether based on an equitable remedy or based on a claim for
19 damages for breach of fiduciary duty under the foregoing case
20 law and section 502 of ERISA.

21 This is not an evidentiary hearing; this is a
22 sufficiency hearing and therefore is generally governed by a
23 standard akin to on all -- or in fact on all fours with, for
24 purposes of the claims resolution process and these cases, of
25 the standard under Federal Rules of Civil Procedure 12(b)(6)

1 Twombly and Iqbal. So therefore I am focusing only on the
2 assertions in the claim and whether they set forth a legally
3 feasible claim. I'm not weighing the evidence that might be
4 offered in their support except to the extent that the
5 assertions simply are not plausible or the facts are
6 uncontroverted. If the assertions are simply not plausible,
7 given the context, I would require the unions to set forth more
8 in their claim.

9 That wrinkle really doesn't come into play here
10 because of the clarification of the nature of the union's
11 breach of fiduciary duty claim. The unions contend that the
12 debtor as a plan fiduciary breached its fiduciary duty
13 essentially in two ways, and again this is with the debtor
14 wearing its hat as plan administrator and not as employer or in
15 any other capacity.

16 First, the unions contend that although the debtor
17 agreed in the PBGC settlement that the PBGC was entitled to an
18 allowed claim of seven billion dollars in respect of the
19 employer's termination of the pension plan, it -- the PBGC
20 would have an allowed claim of only three billion dollars. The
21 unions contend, therefore, that as plan administrator the
22 debtor left money on the table for itself as debtor rather than
23 having it be allocated to pay a larger claim and that
24 therefore, in essence, it was self-dealing.

25 Secondly, the union contends that in the same -- the

1 unions, excuse me -- the unions contend that in the same PBGC
2 settlement agreement the debtor agreed, along with the PBGC and
3 GM, that to the extent that the pension claims would not be
4 paid in full to the PBGC and/or to the beneficiaries, that GM
5 would pay the difference.

6 As far as the United Auto Worker beneficiaries were
7 concerned, the settlement agreement also contemplated the
8 possibility that the same treatment would apply to other union
9 beneficiaries such as the United Steel Workers and the IUE,
10 which treatment eventually was agreed to by GM.

11 The debtor also facilitated the so-called 414
12 transfers of both beneficiaries' liabilities and the associated
13 assets of the plan to other plans by GM. I do not believe,
14 however, that the latter agreement is being attacked as a
15 breach of fiduciary duty, nor do I believe that there would be
16 a basis for it to be attacked.

17 The contention is, however, with regard to the former
18 agreement that the debtor was unfavorably or unfairly
19 permitting certain beneficiaries of the pension plan to receive
20 additional value in the form of the GM agreed backstop.

21 The fiduciary duty of a plan administrator is clearly
22 different than and separate from any obligations that a plan
23 sponsor or the employer that established a plan has. It's a
24 fiduciary duty that arises under ERISA and the parties are
25 generally in agreement that under ERISA a fiduciary is one who

1 exercises any authority or control respecting management of
2 disposition of the plan's assets and that has control over the
3 operation of the plan as opposed to the terms of the plan.

4 The decision to agree with the PBGC to the plan's
5 termination itself is clearly not a basis for a claim against
6 the debtor for breach of fiduciary duty. The focus would need
7 to be upon whether in administering the plan itself the debtor,
8 as plan administrator, breached a fiduciary duty. The two
9 cases cited in support of the claim by the unions fall into
10 that context Solas v. Current Development Corporation, 557 F.3d
11 772 (7th Cir. 2009) involves an administrator's clear self
12 dealing where the trustee "finagled" the termination so that
13 they would receive, he and his wife, more than their fair share
14 as participants in the plan. In District 65 UAW v. Harper &
15 Row Publishers Inc. 670 F. Supp 550 (S.D.N.Y. 1987) the court
16 found potential breach of fiduciary duty liability with regard
17 to the administrator's, the fiduciary's, use and actual control
18 of the pension plan's assets.

19 I simply do not see how the provisions of the PBGC
20 settlement that contemplated the backstop by GM of unpaid
21 nonguaranteed liabilities of the beneficiaries who were members
22 of the UAW and the potential for doing the same for other union
23 beneficiaries could fall into the category of breach of
24 fiduciary duty under those circumstances. As I noted in
25 connection with the contract portion of my ruling, the amount

1 of payments under the settlement agreement coming from Delphi
2 are not affected by the GM backstop. The GM backstop involves
3 assets of a third party, GM, and GM's agreement, for its
4 reasons, to supplement what would be available from the PBGC
5 and the PBGC's recovery from the debtor and therefore would, to
6 my mind, under no circumstances result in any misuse of the
7 plan's assets or unfair or discriminatory treatment of the
8 plan's beneficiaries in respect of those assets by the plan
9 administrator.

10 The issue of the allowance of the PBGC's claim does
11 involve, indirectly, the, at least superficially, treatment of
12 an asset of the plan but I believe only superficially. The
13 settlement agreement was in contemplation of the PBGC's
14 termination of the pension plan and the allowance of the claim
15 was effectively contingent upon such termination. It was under
16 those circumstances that the PBGC would have sole control of
17 the claim. The agreement was with the debtor since the claim
18 was against the debtor as plan sponsor, not an agreement with
19 the debtor as plan administrator.

20 I do not believe that the debtor had an obligation to
21 bargain against itself for a higher claim. Moreover, given
22 that the claim was, and the agreement, in contemplation of the
23 termination of the plan when, as I have noted the PBGC has sole
24 ownership of the deficiency claim, the plan administrators
25 would have a role in trying to get the deficiency claim against

1 the plan sponsor higher. At that point the claim would be
2 controlled by the PBGC. Thus, I do not believe that the plan
3 administrators had an obligation to jump in and intervene to
4 fight themselves as the debtor in insisting that the claim
5 should be higher or to replace themselves -- itself in a
6 conflict with its role as the plan sponsor. Instead, I believe
7 that given the context of the agreement it was proper to look
8 to PBGC as the owner of the claim and that the potential
9 conflict of interest was therefore bootied by the role that the
10 PBGC played. Consequently, I do not believe that this aspect
11 of the union's claim sets forth a claim for breach of fiduciary
12 duty either.

13 Again, my ruling is based upon the ground rules for a
14 sufficiency hearing under these claims procedures. As I noted
15 during oral argument, I had some suspicions that ultimately the
16 treatment of the claim did not leave the three union groups
17 members, who were beneficiaries of the plan, any worse off in
18 light of the spinoffs. But I'm not basing my ruling on any of
19 that at all. In fact, I'm assuming that the claim would always
20 have been at seven billion dollars and was not reduced in light
21 of any other value that would be going to participants in the
22 plan, from the plan. However, I still do not see how the
23 debtor, as plan administrator, under the circumstances where
24 the PBGC was going to terminate the plan and that the amount of
25 the claim was fixed in contemplation of that termination had an

1 ability, as a fiduciary, to oppose the PBGC's settlement of the
2 claim at three billion dollars.

3 So for each of those reasons I will grant the debtor's
4 objection to the claims to the extent they're based upon an
5 alleged breach of fiduciary duty. So the debtor's counsel
6 should submit an order consistent with that ruling disallowing
7 the claims.

8 MR. LYONS: We will do so, Your Honor.

9 THE COURT: Okay.

10 MR. LYONS: And Your Honor, that's the last item on
11 the agenda so we will see you April 22nd.

12 THE COURT: Okay. Thank you.

13 MR. LYONS: Thank you.

14 (Proceedings concluded at 1:31 PM)

15

16

17

18

19

20

21

22

23

24

25

I N D E X

RULINGS

	Page	Line
Fee Applications Approved	39	7
Forty-Forth Omnibus Objection Relief Granted	48	12
Forty-Fifth Omnibus Objection Relief Granted	50	7
PLA Holdings Claim Rejected; Objection Granted	53	3
Heraeus Tenevo Claim Rejected; Objection Granted	53	25
Milliken & Company Claim Rejected; Objection Granted	53	25
Claim of Ms. Skillman Rejected; Objection Granted	56	4
Claim of Ms. Amort Carbrera Rejected; Objection Granted	56	4
Claim of Ms. Hamlin Rejected; Objection Granted	56	4
Claim of Mr. Miller Rejected; Objection Granted	57	21
Claim of Mr. Goodin Rejected; Objection Granted	58	13
Claim of Mr. Cross Rejected; Objection Granted	59	14
Claim of Mr. McBain Rejected; Objection Granted	60	1

			127
1	Claim of Contrarian Rejected; Objection Granted	60	17
2			
3	Claim of Mr. Potter Rejected; Objection Granted	63	3
4	Claim of Mr. Weber Rejected; Objection Granted	63	3
5			
6	Claim of Mr. Dettinger Rejected; Claim to be Withdrawn by Claimant	68	8
7	Claim of Mr. Gardner Rejected; Objection Granted	73	3
8			
9	Claim Disallowed Based on Union's Lack of Standing to Pursue Claim for Money	119	16
10			
11	Debtor's Objection to Claims, Granted	125	3
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Dena Page

Also transcribed by:

Pnina Eilberg, AAERT Certified Electronic Transcriber
(CET**D-488)

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501

Date: March 24, 2010